TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1904.

No. [redacted] 10.

THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 18, 1904.

(19,274.)

(19,274.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210.

THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Original petition filed in No. 22554	1	1
Amended petition in No. 22554	2	1
Original petition in No. 23100	5	3
Motion to consolidate Nos. 22554 and 23100	8	5
Original petition in No. 24085	8	6
Order to consolidate No. 24085 with Nos. 22554 and 23100	11	8
Traverse	11	8
Argument and submission	11	8
Findings of fact	12	9
Conclusion of law	19	17
Opinion of the court	19	18
Judgment	26	25
Application for appeal	27	26
Order allowing appeal	27	26
Clerk's certificate	28	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1904.

1 In the Court of Claims.

THE STATE OF SOUTH CAROLINA
vs.
THE UNITED STATES.
} Nos. 22554, 23100, and 24085, Consolidated.

I.—*Original and Amended Petition in No.* 22554.

The claimant filed its original petition on the 27th day of June 1901.

Subsequently, to wit, on the 13th day of September 1901, the claimant, by leave of court, in lieu of said original petition, filed its amended petition, which is as follows:

2 *Amended Petition.*

Filed September 13, 1901.

THE STATE OF SOUTH CAROLINA
v.
THE UNITED STATES.
} No. 22554.

To the honorable chief justice and judges of the Court of Claims:

The petitioner, The State of South Carolina, herewith files its amended petition, as follows:

I.

Your petitioner respectfully represents:

That by an act of the legislature of South Carolina, approved December 24th, 1892 with subsequent amendments thereto commonly known as the dispensary law, the sale of spirituous and malt liquors by private persons has been prohibited throughout said State since the 1st day of July 1893, when said act went into effect, and the authority to make sales thereof is confined exclusively to the State and county dispensers provided for by said act; said dispensers are, by said law, made the agents of the State for making sales of such liquors, which liquors are the property of the State, and the manner of sale is regulated by the said dispensary law; that the said liquors are sold by said dispensers only at appointed places in the State known and designated as dispensaries, and the proceeds of said sales belong to the State; that by said dispensary law the said dispensers were, and are, prohibited from making, and they have not at any time made, any sales of spirit-ous or malt liquors other than of those belonging to the said State, and that all the profits and losses arising from the said sales, accrue to the said State alone; that the said

dispensers were, and are, salaried officers of said State, and never had any proprietory interest whatever in said liquors, nor in the profits or losses accruing from said sales, and that their salaries have never depended upon the amount of sales made by them; that the said dispensers were and are the State's appointed agents or instrumentalities to carry out its dispensary laws, which laws have for their purpose the control and the minimizing, as far as practicable, of the evils of the traffic in spirit-ous and malt liquors throughout said State. That said State exercises said control under and by virtue of the police power. Petitioner further avers that neither said dispensary officials nor said State are liable to pay any taxes, special or otherwise, to the United States under the revenue laws thereof, either as wholesale or as retail liquor dealers, and that they were not at any time, nor are they now, liquor dealers within the meaning of said revenue laws.

3

II.

That, notwithstanding the premises, the United States collector of internal revenue for the State of South Carolina has for each and every year since, and including, the year commencing the 1st day of July, 1893, when said dispensary law first went into effect, refused to permit the said dispensers to make any sales of spirit-ous or malt liquors, as by the statutes relating to said dispensaries they were required to make, unless, and until, each and every of said dispensers paid to the United States the special tax of twenty-five dollars a year imposed by the revenue laws of the United States upon retail liquor dealers, and he further required the State dispenser to pay in like manner for each and every year a special tax of one hundred and twenty-five dollars, the said collector claiming that said State dispenser was a wholesale, as well as a retail, dealer in liquors; and your petitioner says that the said taxes were accordingly, and only because of said requirement, paid by the State dispenser for himself and for each and every of said dispensers to the said collector, the same being paid out of the funds of said dispensaries, which funds were, and still are, the property of the State of South Carolina. That said payments were made without the authority of any law of the State of South Carolina or of the United States, and were unauthorized by your petitioner; that the sums so paid to the collector of internal revenue as special taxes now amount to twenty thousand dollars, and that said money has been paid over by the said collector to the United States by its direction, and the same has been turned into its Treasury. Your petitioner accordingly avers that the money so paid by the said dispensers being the money of the State, paid as aforesaid, without its authority, and without being liable to pay the same, was had and received by the United States to the use of your petitioner, and the same is legally and equitably now due and payable to your petitioner by the United States.

4

Wherefore your petitioner demands judgment against the United States for the said sum of twenty thousand dollars.

FRANKLIN H. MACKEY, *Attorney.*

DISTRICT OF COLUMBIA, *To wit:*

Franklin H. Mackey, being first duly sworn, deposes and says that he is the attorney for the petitioner above mentioned and has read the foregoing and annexed amended petition by him subscribed, and that he knows the contents thereof; that the matters and things therein alleged upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

Subscribed and sworn to before me this 13th September, A. D. 1901.

[SEAL.] ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

5 II.—*Petition.*

Filed November 5, 1902.

In the Court of Claims of the United States.

STATE OF SOUTH CAROLINA
vs.
UNITED STATES. } No. 23100.

To the honorable chief justice and judges of the Court of Claims:

The petitioner, The State of South Carolina, herewith files its petition as follows:

I.

Your petitioner respectfully represents—

That by an act of the legislature of South Carolina approved December 24th, 1892, without subsequent amendments thereto, commonly known as the dispensary law, the sale of spirit-ous and malt liquors by private persons has been prohibited throughout said State since the 1st day of July, 1893, when said act went into effect, and the authority to make sales thereof is confined exclusively to the State and county dispensers provided for by said act; said dispensers are, by said law, made the agents of the State for making sales of such liquors, which liquors are the property of the State, and the manner of sale is regulated by the said dispensary law; that the said liquors are sold by said dispensers only at appointed

places in the State, known and designated as dispensaries, and the proceeds of said sales belong to the State; that by said dispensary law the said dispensers were, and are, prohibited from making, and they have not at any time made, any sales of spirit-ous or malt liquors other than of those belonging to the said State, and that all the profits and losses arising from the said sales accrue to the said State alone; that the said dispensers were, and are, salaried officers of said State, and never had any proprietary interest whatever in said liquors, nor in the profits or losses accruing from
6 said sales, and that their salaries have never depended upon the amount of sales made by them; that the said dispensers were and are the State's appointed agents or instrumentalities to carry out its dispensary laws, which laws have for their purpose the control and the minimizing, as far as practicable, of the evils of the traffic in spirit-ous and malt liquors throughout said State; that said State exercises said control under and by virtue of its police power. Petitioner further avers that neither said dispensary officials nor said State are liable to pay any taxes, special or otherwise, to the United States under the revenue laws thereof, either as wholesale or as retail liquor dealers, and that they were not at any time, nor are they now, liquor dealers within the meaning of said revenue laws.

II.

That, notwithstanding the premises, the United States collector of internal revenue for the State of South Carolina has for each and every year since, and including, the year commencing the 1st day of July, 1901, refused to permit the said dispensers to make any sales of spirit-ous or malt liquors, as by the statutes relating to said dispensaries they were required to make, unless, and until, each and every of said dispensers paid to the United States the special tax of twenty-five dollars a year imposed by the revenue laws of the United States upon retail liquor dealers, and he further required the State dispenser to pay in like manner for each and every year a special tax of one hundred and twenty-five dollars, the said collector claiming that said State dispenser was a wholesale, as well as a retail, dealer in liquors; and your petitioner says that the said taxes were accordingly, and only because of said requirement, paid by the State dispenser for himself and for each and every of said dispensers to the said collector, the same being paid out of the funds of said dispensaries, which funds were, and still are, the property of the State of South Carolina; that said payments were made without
7 the authority of any law of the State of South Carolina or of the United States, and were unauthorized by your petitioner; that the sums so paid to the collector of internal revenue as special taxes now amount to six thousand two hundred dollars, and that said money has been paid over by the said collector to the United States by its direction, and the same has been turned into its Treasury. Your petitioner accordingly avers that the money so paid by

the said dispensers being the money of the State, paid as aforesaid, without its authority, and without being liable to pay the same, was had and received by the United States to the use of your petitioner, and the same is legally and equitably now due and payable to your petitioner by the United States.

Wherefore your petitioner demands judgment against the United States for the said sum of six thousand two hundred dollars.

FRANKLIN H. MACKEY, *Attorney.*

DISTRICT OF COLUMBIA, *To wit:*

Franklin H. Mackey, being first duly sworn, deposes and says that he is the attorney for the petitioner above mentioned and has read the foregoing and annexed amended petition by him subscribed, and that he knows the contents thereof; that the matters and things therein alleged upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

Subscribed and sworn to before me this 5th day of November, A. D. 1902.

GEORGE W. TAYLOR,
Notary Public.

[SEAL.]

8 III.—*Motion to Consolidate Case No.* 23100 *with Case No.* 22554.

Now comes the claimant by its attorney Franklin H. Mackey and moves the court to consolidate the case of The State of South Carolina *vs.* The United States No. 23100 with the case of The State of South Carolina *v.* The United States No. 22554.

FRANKLIN H. MACKEY,
Att'y for Claimant.

Filed and allowed December 20, 1902.

IV.—*Petition.*

Filed October 9, 1903.

STATE OF SOUTH CAROLINA
vs.
THE UNITED STATES. } No. 24085.

To the honorable chief justice and judges of the Court of Claims:

The petitioner, The State of South Carolina, herewith files its petition as follows:

I.

Your petitioner respectfully represents—

That by an act of the legislature of South Carolina approved December 24th, 1892, with subsequent amendments thereto, commonly known as the dispensary law, the sale of spirituous and malt liquors by private persons has been prohibited throughout
9 that State since the first day of July, 1893, when said act went into effect, and the authority to make sales thereof is confined exclusively to the State and county dispensers provided for by said act; said dispensers are, by said law, made the agents of the State for making sales of such liquors, which liquors are the property of the State, and the manner of sale is regulated by the said dispensary law; that the said liquors are sold by said dispensers only at appointed places in the State, known and designated as dispensaries, and the proceeds of said sales belong to the State; that by said dispensary law the said dispensers were, and are, prohibited from making, and they have not at any time made, any sales of spirituous or malt liquors other than of those belonging to the said State, and that all the profits and losses arising from the said sales accrue to the said State alone; that the said dispensers were, and are, salaried officers of said State, and never had any proprietary interest whatever in said liquors, nor in the profits or losses accruing from said sales, and that their salaries have never depended upon the amount of sales made by them; that the said dispensers were and are the State's appointed agents or instrumentalities to carry out its dispensary laws, which laws have for their purpose the control and the minimizing, as far as practicable, of the evils of the traffic in spirituous and malt liquors throughout that State; that said State exercises said control under and by virtue of its police power. Petitioner further avers that neither said dispensary officials nor said State are liable to pay any taxes, special or otherwise, to the United States under the revenue laws thereof, either as wholesale or as retail liquor dealers, and that they were not at any time, nor are they now, liquor dealers within the meaning of said revenue laws.

II.

That notwithstanding the premises, the United States col-
10 lector of internal revenue for the State of South Carolina has for each and every year since, and including, the year commencing the 1st day of July, 1901, refused to permit the said dispensers to make any sales of spirituous or malt liquors, as by the statutes relating to said dispensaries they were required to make unless, and until, each and every of said dispensers paid to the United States the special tax of twenty-five dollars a year imposed by the revenue laws of the United States upon retail liquor dealers, and he further required the State dispenser to pay in like manner for each and every year a special tax of one hundred and twenty-five dollars, the said collector claiming that said State dispenser was a wholesale, as well as a retail, dealer in liquors; and your petitioner says that the said taxes were accordingly, and only because of said requirement, paid by the State dispenser for himself and for each and every of said dispensers to the said collector, the same being paid out of the funds of said dispensaries, which funds were, and still are, the property of the State of South Carolina; that said payments were made without the authority of any law of the State of South Carolina or of the United States, and were unauthorized by your petitioner; that the sums so paid to the collector of internal revenue as special taxes now amount to four thousand dollars, and that said money has been paid over by the said collector to the United States by its direction, and the same has been turned into its Treasury. Your petitioner accordingly avers that the money so paid by the said dispensers being the money of the State, paid as aforesaid, without its authority, and without being liable to pay the same, was had and received by the United States to the use of your petitioner, and the same is legally and equitably now due and payable to your petitioner by the United States.

Wherefore your petitioner demands judgment against the United States for the said sum of four thousand dollars.

FRANKLIN H. MACKEY, *Attorney.*

DISTRICT OF COLUMBIA, *To wit:*

Franklin H. Mackey, being first duly sworn, deposes and says that he is the attorney for the petitioner above mentioned and has read the foregoing and annexed amended petition by him subscribed, and that he knows the contents thereof; that the matters and things therein alleged upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

Subscribed and sworn to before me this 9th day of October, A. D. 1903.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk, Court of Claims.

11 V.—*Order Consolidating Case No.* 24085 *with Cases* 22554 *and* 23100.

STATE OF SOUTH CAROLINA
v.
THE UNITED STATES. } No. 24085.

It is ordered that this case be consolidated with the cases between the same parties numbered 22554 and 23100.

BY THE COURT.

Filed February 29, 1904.

VI.—*Traverse.*

Filed by defendants Nov. 18, 1903.

In the Court of Claims of the United States, December Term, A. D. 1902–1903.

THE STATE OF SOUTH CAROLINA
vs.
THE UNITED STATES. } Nos. 22554, 23100, & 24085, Consolidated.

And now comes the Attorney General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

Filed Nov. 18, 1903.

VII.—*Argument and Submission.*

On the 17th and 18th days of November 1903 this case was argued and submitted.

12 VIII.—*Findings of Fact and Conclusion of Law.*

Filed February 29, 1904.

THE STATE OF SOUTH CAROLINA
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The General Assembly of the State of South Carolina passed an act, approved December 24, 1892, entitled "An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within the State except as therein provided." This act has been amended by subsequent acts of said General Assembly.

The act of December 24, 1892, went into effect on the 1st day of July, 1893. In 1893 there were sixty-six dispensaries, and from time to time the number has increased until on the 1st of July, 1901, they numbered one hundred and one.

II.

For each and every year since, and including the year commencing the 1st day of July, 1893, the United States collector of internal revenue for the district of South Carolina has required the State dispensary commissioner and the county dispensers, in order that they may make sales of spirituous or malt liquors in accordance with the provisions of the dispensary laws of the State of South Carolina, to pay a special tax of $100 a year as a wholesale liquor dealer; and, in like manner, each of the county dispensers were required to pay a special tax of $25 a year as retail liquor dealers. These taxes were claimed and required to be paid by said collector upon the ground that the said dispensers were "liquor dealers" within the meaning of the internal-revenue laws of the United States, and as such were liable to pay said taxes.

Each dispenser, previous to receiving his special tax receipt, was required to file and did file with the collector a so-called "special tax return," the same being prepared upon a blank form prescribed by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury (R. S. U. S., 321) and known as form No. 11. The following is a copy (omitting the jurat) of said
13 special tax return as made out upon said form No. 11, all of these returns being alike except as to names and dates:

"United States internal revenue.

"*Return for Special Tax.*

"STATE OF So. Ca.,
"*County of Richland.*

"The undersigned, W. D. Price, being duly sworn according to law, declares that on the 1st day of July, 1900, he intends to engage in the business or occupation of retail liquor dealer, as county dispenser, subject to special tax under the internal-revenue laws of the United States; said business or occupation to be carried on at Columbia, in the county of Richland, State of So. Ca., and that he has done no business for which he would be liable to pay a special tax without having paid the same, except as above.

"W. D. PRICE."

III.

In compliance with the aforesaid requirement of the collector of internal revenue the State dispensary commissioner for each and every year respectively since and including the year commencing the 1st day of July, 1893, drew his warrant upon the State treasurer of South Carolina in favor of said collector for the special taxes claimed and demanded by him as aforesaid of the county dispensers and of the State dispenser.

IV.

Said warrants were thereafter paid by the State treasurer of South Carolina to the said collector, and the amounts of money so paid were by the latter paid into the Treasury of the United States as internal-revenue taxes.

The total of the amounts so paid and received by the United States from the year commencing July 1, 1895, to the year commencing July 1, 1901, both inclusive, is as follows:

Years.	Number of county dispensaries.	Total.
For the 1895	85, at $25 each	$2,125
" " 1896	90, " " "	2,250
" " 1897	90, " " "	2,250
" " 1898	93, " " "	2,325
" " 1899	92, " " "	2,300
" " 1900	94, " " "	2,350
" " 1901	101, " " "	2,801.02
Total paid by counties		$16,401.02
Total paid by State dispensers, $125 each		875
Amount of taxes paid for the years 1902 and 1903		5,564.59
Total paid by State and county dispensers		$22,840.71

V.

All of the liquor sold by the dispensary agents during said years was the property of the State of South Carolina, and all the profits and losses arising from said sales accrued to the said State. The dispensers never have had any proprietary interest of any sort in the liquors sold nor in the profits derived therefrom.

14 VI.

Among the regulations of the dispensary are the following:

"1. Liquors shall only be sold in sealed packages of not less than one half-pint or more than five gallons.

"2. The packages shall not be opened nor the liquor drunk upon the premises of the dispensary.

"3. Liquor shall not be sold to minors, nor intoxicated persons, nor persons in the habit of being intoxicated, nor to persons not personally known to the dispenser as a person of good character and habits, or upon the statement of a reliable and trustworthy person personally known to the dispenser that said person is of such character and habits.

"4. Liquors shall only be sold in the daytime, viz., from sunrise to sunset.

"5. They shall not be sold upon credit nor for barter.

"6. Not more than one sale a day shall be made to any one person.

"7. No label or device other than those furnished by the State dispensary shall be placed upon any package containing liquor."

VII.

Under the authority of and in pursuance to sections 3220 and 3227 of the Revised Statutes of the United States, the Secretary of the Treasury of the United States has prescribed for the use of persons making the appeal provided for by said sections certain forms, designated as form 38 and form 46. The following are copies of said forms, with the regulations or instructions issued by the Secretary of the Treasury in respect to form 46 printed thereon.

"United States internal revenue.

"*Claim for the Redemption of Stamps under Act of May 12, 1900, 'Authorizing the Commissioner of Internal Revenue to Redeem or Make Allowance for Internal-revenue Stamps.'*

"STATE OF ——, } ss:
County of ——, }

"—— ——, of —— State and county aforesaid, being duly sworn according to law, deposes and says that he is —— —— the claimant (If a member of firm, or officer of a corporation or an agent, state the fact) herein; that claimant was engaged in the business of —, and

upon the — day of ——, A. D. —, purchased from —— —— the internal revenue — stamp of the face value of —$\frac{}{100}$ dollars, herewith presented for redemption, and that the said claimant, (Insert name of actual owner of stamps) —— —— is now the *bona fide* owner of said stamp and justly entitled to reimbursement therefor. Deponent now asks and demands that the sum of —$\frac{}{100}$ dollars, being the face value of said stamp , less — per cent. discount, be refunded as provided in act of May 12, 1900, for the following reasons, viz.: (See Nos. 4, 5, 6 and 7 of instructions on page 3.)

15 "Deponent further says (see note A) that claimant has not heretofore presented any claim for the refunding of the above-mentioned amount or any part thereof; that the value or reimbursement of the value of said stamp or any portion thereof has not heretofore been received by claimant, directly or indirectly, and, further, that all articles subject to tax manufactured, issued, or sold by claimant were fully stamped, as required by law, and that the said claimant is not indebted to the United States in any amount whatever; and deponent further states that such stamp ha never been used otherwise than as above specified.

"—— ——,

"P. O. address: —— ——.

"Sworn to and subscribed before me this — day of ——, A. D. —.

"A. If a claim has been presented before, state the fact in lieu of this."

The following is a copy of form 46:

"*Claim under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1 for Taxes Improperly Paid or Refundable under Remedial Statutes and for Amounts Paid for Stamps Used in Error or Excess.*

"U. S. internal revenue.

"STATE OF ——, "*County of* ——, } ss:

—— ——, of the * — of —— and State and county aforesaid, being duly — according to law, deposes and says that † —— that he w engaged in the business of —; that upon — day of ——, A. D. —, he w assessed an internal-revenue tax of — dollars, ‡ ——, which amount he afterwards, on the — day of ——, A. D., —, paid to —— ——, Esq., collector of internal revenue for

* Give post-office address.
† If a member of a firm, state the fact.
‡ State for or upon what the tax was assessed or the stamps affixed.

the — district of ——, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

_____

_____

_____

And this deponent now claims that, by reason of the payment of the said sum of — dollars, he — justly entitled to have the sum of — dollars refunded, and he now ask and demand the same or such greater amount as the Commissioner of Internal Revenue may find to have been erroneously paid or to be refundable under remedial statutes; and this deponent further makes oath that he has not heretofore presented any claim for the refunding of the above amount or any part thereof.*

"—— ——.

"Sworn to and subscribed before me this — day of ——, A. D. 190–.

—— ——.

16 Then follow the "instructions," which contain, among others, the following:

"*Instructions in Regard to Preparation of Claim.*

"No. 1. All blank spaces provided in the claim, on page 1, and in the deputy collector's certificates, and collector's certificates on pages 2 and 4, must be properly filled.

"No. 4. In claims arising on account of special tax stamps it is not sufficient to state that the claimants have done no business for which they would be liable to special tax. Affidavits should be furnished containing specific denial as to each and all of the acts involving liability to special tax, as found in the statute imposing the tax; for instance, in the case of a retail liquor dealer: That from —— to —— he neither 'sold nor offered for sale any foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine gallons at the same time.'

"No. 5. In cases where two special tax stamps of the same kind have been issued for the same period and place to the same person or firm, an affidavit as above should be furnished, adding thereto the words, '*except in one place* (or more, as the case may be), *for which he has paid the special tax required by law.*'

"No. 6. Where, in case of dissolution of a firm which had paid special tax, the remaining partner or partners have been required to pay new special tax for the unexpired portion of the time for which tax was paid by the original firm, and claim the refunding of the tax paid, it should be established that from —— to ——, the

* If a claim has been presented before, state the fact in lieu of this.

successor carried on the same business as the original firm, and that during such period no person, not a member of the original firm, was taken into partnership.

"No. 8. A claim for refunding should *he* made in the name of the party assessed, if living; if he is dead, there should be evidence of his death, and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testimentary, or other similar evidence, should be annexed to the claim to show that the claimant is administrator, etc.

The affidavit may be made by an agent of the party assessed; but, in such a case, there should be evidence of the agency, and of the sources of the agent's knowledge concerning the case in question.

VIII.

In the administration of these laws there has been established in the city of Columbia a wholesale department where all the liquors purchased by the State commissioner are kept and stored. From this wholesale department the various retail dispensers receive their supplies and sell them to the consumers as provided in the acts. All the liquors so purchased and sold are purchased from the funds of the dispensary account. Neither the State commissioner nor the city or county dispensers have any property interests, as persons, in said goods, the same being the property of the dispensary system. The profits arising from the sale of such liquors, after the payment of all expenses of every sort arising from the conduct of the business, are distributed as follows: One-half of said profits is equally divided between the municipality and the county in which
17 the dispensaries are located, the remaining one-half being paid into the State treasury. The profits arising from the sale of spirituous, vinous, and malt liquors under this dispensary system, and accruing to the counties, towns, and State, amounted in the year 1901 to the sum of $545,248.12, upon gross sales amounting to $2,328,681.21.

IX.

The total number of special-license stamps issued to wholesale and retail liquor dealers in the State of South Carolina by the United States internal-revenue collector for the district of South Carolina during the year 1902 was 372. Of this number 112 were issued to the State and county dispensers and 260 to private individuals, who pay to the United States internal-revenue collector their regular special license tax as retail liquor dealers, and for that purpose make application for the same on form No. 11 of the return for special tax, which is as follows:

"STATE OF ——, }
County of ——. }

"The undersigned —— ——, of the firm of —— ——, being duly sworn according to law, declares that on the — day of ——, 1902, he intends to engage in the business or occupation of retail liquor dealer, said firm consisting of the following-named persons, ——, ——, subject to the special tax under the internal-revenue laws of the United States; said business or occupation to be carried on at No. — —— street, in ——, county of ——, State of South Carolina, and that he has done no business for which he would be liable to pay a special tax without having paid the same, except as above."

This application is signed by the person engaged in the retail liquor business, and forms a part of the public records of the office of the internal-revenue collector for the district of South Carolina.

X.

On July 15, 1893, the State of South Carolina, by its governor, paid into the Treasury of the United States the sum of $25, and filed with the Commissioner of Patents, in conformity with the provisions of the act of Congress of 1881, and with the regulations prescribed by the Commissioner of Patents, a statement and declaration which began by stating that "the State of South Carolina, one of the Commonwealths comprising the United States of America, possessed in this regard of the full rights of a corporation, and doing business at its capital city of Columbia, in the county of Richmond, State aforesaid, has adopted for its use a trade-mark for chemically pure distilled liquors, consisting of the word 'palmetto,' and particularly described: was accompanied by facsimiles of the trade-mark; was supported by a declaration on oath of the governor of the State that he verily believed that the foregoing statement is true; that the State at this time has the right to the use of the trade-mark therein described; that no other person or firm or corporation has the right to use such, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the said State in commerce with foreign nations or Indian tribes, and particularly with Canada; and that the descriptions and facsimiles presented for record truly represent the trade-mark sought to be registered."

At the hearing before the Commissioner of Patents it appeared
that the trade-mark had been adopted by the State board of
18 control and that the State had sold in Canada a case of liquors with this trade-mark.

XI.

The payments made for said special license taxes were sometimes made to the United States internal-revenue collector in cash and

sometimes by warrant. When paid by the warrant the form thereof was as follows:

"State of South Carolina."

"No. 548.

"OFFICE OF STATE BOARD OF DIRECTORS,
"SOUTH CAROLINA STATE DISPENSARY,
"$1,950.00. "COLUMBIA, S. C., *July 6th*, 1900.

"The State treasurer of South Carolina:

"Under the State dispensary act, as per voucher on file in this office, pay to the order of E. A. Webster, collector, nineteen hundred and fifty dollars, on account of revenue license.

"H. H. CRUM,
"*State Commissioner.*"

The receipt for said payment was as follows:

"Twelve coupons, one for each month of the year, are annexed to this receipt."

"$25.00. No. —.
"Series of 1895. Series of 1895.

"United States
"Stamp for special tax,
"Internal revenue.

"Received from W. D. Price the sum of twenty-five dollars for special tax on the business of retail dealer in liquors, to be carried on at dispensary No. —, Columbia, State of South Carolina, for the period represented by the coupon or coupons hereto attached.

"Dated at Columbia, So. Ca.

"E. D. WEBSTER,
"$25.00. *Collector So. Ca. Dist.*

"Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business."

Prior to April 4, 1901, none of these payments were made under protest, nor was any objection made to the payment thereof. On April 4, 1901, the following protest was sent by the State dispensary commissioner to the United States internal-revenue collector for the district of South Carolina:

"OFFICE OF STATE DISPENSARY COMMISSIONER,
"SOUTH CAROLINA DISPENSARY,
"COLUMBIA, S. C., *April* 4, 1901.

"Hon. E. A. Webster, collector of internal revenue, Columbia, S. C.

"SIR: Pursuant to the advice of the attorney general of this State and of the board of directors of the State dispensary, I beg to
19 inform you that hereafter any applications for the issue of stamps for special taxes for wholesale or retail liquor dealers which may be sent to you by this office or any of the State or county dispensary officials, and the payment of moneys in pursuance of said applications, are made under protest that said applications and said payments are illegally required by you, and that neither the State of South Carolina nor any of its officials or agents are liable to pay any tax whatever, whether stamp taxes or otherwise, to the United States as wholesale or retail liquor dealers by reason of any sales of spirit-ous or malt liquors by the State and county dispensaries. The applications and the said payments are therefore made only because they are demanded by you and because to refuse compliance therewith might cause a conflict between the officials of this State and those of the United States.

"You are further informed that after said applications and payments shall have been made, that State of South Carolina, through its proper officials, will take such steps as may be found necessary, either in the courts or otherwise, to secure reimbursement of the moneys thus illegally demanded by and paid to you.

(Signed) "H. H. CRUM,
"*State Dispensary Commissioner.*"

XII.

No appeal or application for the repayment of the aforesaid sums paid by the various dispensers as wholesale and retail liquor dealers has been made by the State of South Carolina to the Commissioner of Internal Revenue, under the provisions of sections 3226, 3227, and 3228, Revised Statutes.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petitions in the above-entitled cases be dismissed.

BY THE COURT.

IX.—*Opinion of the Court and Concurring Opinion.*

NOTT, Ch. J., delivered the opinion of the majority of the court.

This is believed to be the first case brought before a court in which a State has united in one undertaking an exercise of the police power with a commercial business. The exercise of the police power is by legislating and limiting the sale of intoxicating liquor; the commercial business is that of buying and selling such liquors for profit; the question involved is whether the dispensary agents of the State can be required to pay the special tax or license fee imposed on dealers in liquors by the internal-revenue laws of the United States.

The counsel of the United States has offered evidence to show, that the exercise of the police power, is little more than a disguise; and he has contended that the real purpose of the assumed exercise of the police power—the substance and not the form—must be considered; and that the real purpose of the South Carolina dispensary system is that of making money. The evidence offered shows, or tends to show, that there are 260 persons now selling intoxicants as retail dealers under United States internal-revenue licenses; that in the city of Columbia there are numerous places in the immediate neighborhood of the dispensaries, and within sight of the State capitol, where liquor is openly sold; that where the keepers of drinking saloons purchase from the dispensaries they are not prosecuted, and that when the business of selling at a profit was once interrupted, the State seriously contemplated abandoning the system. The counsel for the claimant, on the contrary, has produced evidence, to show that the consumption of intoxicating liquor in the State has been greatly reduced and the evils of intemperance consequently diminished; and he has contended that neither the violation of the law by individuals, nor the lax administration of it by State officers can be regarded as a part of the system, or as a sufficient reason why the exercise of the police power should be denied to the State.

It seems to us clear—it seems, indeed, incontrovertible—that in South Carolina, as elsewhere, a large portion of the people are honestly and earnestly in favor of the system for the single minded purpose of repressing the many evils of intemperance; that a portion of the people there, as elsewhere, reason no farther than that if intoxicants must be sold, and consequent drunkenness and crime must exist, it is fair that society, which has to support and bear the expenses incident to crime and pauperism, should receive the profits of the business rather than the individual vendors who, by their traffic, are the immediate cause of these evils. There is also in South Carolina, as elsewhere, a third class, who care little for the general welfare; whose motive is their own pleasure or profit; who do not believe in prohibition, and who evade and defy this law as other laws

for a similar purpose have been evaded and defied in other States. In the consideration of this case the court puts aside all of the evidence above referred to, and rests its decision exclusively upon what may be called the official record; that is to say, upon the statutes of the legislature and the action of the executive.

The commercial character of the State's undertaking is stamped unmistakably upon the system. The statute establishing it authorized a profit of 50 per cent., and contemplated large profits, directing the manner in which they should be utilized and distributed. As a matter of fact, the system has been a great commercial success, and has yielded large profits. In 1898, however, the system as a business was confronted by judicial interference in the form of an injunction which enjoined the State officers from interfering with the delivery and sale of liquor brought into the State from beyond its borders. The governor of South Carolina regarded the injunction as a blow possibly, if not probably, fatal to the system itself. In his annual message he brought the subject before the legislature, and said:

"Judge Simonton has destroyed, along with the dispensary, the license system *when run for profit*. What, then, is left to do? We must either enact prohibition or continue the dispensary system *without the profit feature*. Many, a majority, I believe, do not think prohibition is practicable; and many have approved the dispensary system *because of the profit feature*. We can certainly get rid of the 'original package' dealer and their demoralizing traffic by continuing the dispensary, *shorn of all profits and administered only as a police regulation to control and reduce the liquor evil*. The Federal judge will have neither occasion nor excuse for his ever-ready injunctions, *if that system shall be inaugurated*, unless he shall again re-
21 verse his own previous decision. This, then, appears to me to be the best and almost the only thing left for us to do. *We might try this policy for a year*, and next winter, after Congress shall have acted or failed to act, and after the Supreme Court at Washington shall have decided what is to become of the State's power to control liquor under the Wilson bill of 1890, we shall be in a position to take final action."

And in his annual message of the following year, he said:

"The dispensaries have been forced to fight free whiskey on terms of absolute equality; yet, strange to say, they have fought it successfully; *for while the profits were reduced by this lawless competition, there was still enough business to make the dispensary self-supporting and leave a small margin of profit.*"

The legislature apparently acquiesced in the suggestion of the executive in 1898 to "try this policy for a year," and allowed the system to continue; and it continued to do business and to make a profit upon its business, as shown by the above quotation from the message of 1899, notwithstanding that imported liquor was brought into the State and sold in the original packages. But before the year of probation expired the competition which the governor of

South Carolina deplored was largely, if not altogether, removed by the decision of the Supreme Court in Vance *v.* Vandercook (170 U. S. R., 438), wherein it was held that the purchaser within a State has the constitutional right to receive packages sent from another State for his own use, notwithstanding that there be State laws to the contrary, but that he can not sell in the original packages in defiance of State law. There was thus restored to the State substantially its monopoly of the sale of intoxicating liquors, and the business yielded a net profit in the year 1901 of $545,248.12.

The right of the State of South Carolina to carry on the business of its dispensary system exempt from the Federal excise tax is rested on one or the other of two general constitutional principles: That the dispensary system is an exercise of the police power of the State, beyond the interference of the General Government; that the National Government has no constitutional power to impose a tax upon the administrative agencies of a State government.

It will avail us nothing to appeal to the letter of the Constitution. The framers of the Constitution had before them during one hundred days of unapproachable constructive work three great purposes. The first was the construction of a new National Government. The second was the establishment of a dual system of government and the distribution of powers between the General or National Government and the local or State governments. The third was placing certain immutable restrictions upon the powers of government—restrictions which might apply to the National Government or the State governments, or to all, for the purpose of securing the individual rights of the citizen and making constitutional liberty perpetual and secure.

There are special provisions of the Constitution, such as that Congress shall have power to "coin money;" to secure to "authors and inventors the exclusive right to their respective writings and discoveries;" such as that no State shall "keep troops or ships of war in time of peace" or "enter into any agreement or compact with another State;" or "make anything but gold and silver coin a tender in payment of debts," or pass a law "impairing the
22 obligation of contracts;" such as that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" that "no preference shall be given to the ports of one State over those of another." But such provisions are always directly or indirectly in furtherance of one or the other or all of the three great purposes of the framers.

The statutory provisions, declarative and restrictive, by which the people of several States in recent constitutions have tied their representatives' hands, and their own, have no place in the framework of government established by the Constitution.

In the present constitution of South Carolina (1895), and in relation to this same dispensary system which is now before the court,

there is a statutory regulation or proviso "that no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises." In the three systems generally known as the "Swedish system" is one regarded as the most effective of the three, which, in the country and small villages, requires the liquor sold at a Government dispensary to be drunk on the premises, and prohibits its being carried away to inebriate the purchaser and destroy the peace and happiness of the home; yet the people of South Carolina have inhibited their representatives and themselves from even so much as trying that experiment. The framers of the Constitution attempted no such restrictive legislation, but left the people of the United States free to make their own laws and, by the proper discharge of the duties of citizenship, to work out their own political salvation.

Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plane of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, "a legion of mercenaries," had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments.

Accordingly, we find in the Constitution the power expressly delegated to the National Government to "lay and collect taxes, duties, imposts, and excises;" and the power expressly prohibited to the States, without the consent of Congress, to "lay any imposts or duties on imports or exports;" but no such restriction was laid upon either the National or State Governments in regard to the exercise of the police power. The police power is the power "to impose those restraints upon private rights which are necessary for the general welfare." It is a power inherent in all governments, needing
23 neither grant nor recognition in the Constitution. Without it civilized society in dense population would be constantly drifting back toward barbarism. In this country it can not be said to be wholly unrestricted, but the restrictions begin only where the exercise of it trenches upon the constitutional rights of individuals or of the States. It has been called an implied power, but is not, strictly speaking, an implied power, but an inherent power, which

is neither inhibited nor regulated by the Constitution. The cases which have come before the courts have generally been cases in which the exercise of the police power has trenched upon the constitutional rights of individuals or been in conflict with the reciprocal rights of the States to interstate commerce, or in which a State legislature has sought to do something in the disguise of an exercise of the police power which is prohibited by its State constitution. In this case no such conflict exists. The right of the State to regulate or prohibit the sale of intoxicants is conceded; the right of the State to do so in this particular way is not, in the opinion of the court, involved. The National Government, in effect, says to the State, "Exercise your police power as you will, but pay to the National Government a tax which is authorized by the Constitution and imposed by statute." The National Government does not interfere with the exercise of the police power; but the National Government can not be compelled, directly or indirectly, to aid it. The police power extends no further than the general welfare. The general welfare is one thing; exemption from taxation is another.

As regards the second ground upon which this suit rests, the ground that the Constitution contains no grant of power, express or implied, to tax a State or its means and instrumentalities of government, the court is aware of the decisions of the Supreme Court, which may be summed up in the income-tax case, that "As the States can not tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."—Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. R., 429, 584.

But between the principle involved in those cases and the principle involved in this case there seems to the court to be three broad and plain distinctions:

The first distinction is fundamental. The money exacted here is not a direct tax but an excise. It was at the time of the adoption of the Constitution, and still is, the theory upon which the constitutional provision rests that an excise upon a salable article is paid by the purchaser. A tax is obligatory; from it there is no escape. An excise is voluntary; the purchaser who would pay it can not be compelled to purchase. As was said by Mr. Justice Brown in Pollock *v.* Farmers' Loan and Trust Co. (157 U. S. R., 429, 491), "direct taxes are paid by the taxpayer, both immediately and ultimately; indirect taxes are paid immediately by the taxpayer and ultimately by somebody else." The State of South Carolina here stands on precisely the same footing which every other dealer stands upon. All that it has to do is to add this internal-revenue excise to the price of the liquor which it sells and let the purchaser pay it. If there be exemption, it will not be the State which will be exempted from the payment of this excise, but the purchaser of liquor within the
24 State. That the increase of the price may invite smuggling and promote illicit selling and lessen the power of the State

as a dealer in the struggle of competition are objections, but they bear no more heavily on the State than on the individual dealer. These things add to his expenditures; they increase his prices; they lessen his sales; they impair his power to compete; but nevertheless in the contemplation of the Constitution and in the contemplation of the law it is the purchaser and not the dealer who pays the tax.

The second distinction is that in the income tax case of The Collector *v.* Day (11 Wall. 113) a tax had been extended to "a function strictly belonging" to a State "in its ordinary governmental capacity." (Ambrosini *v.* United States, 187 U. S. R., 1.) If, for illustration, the General Government were to tax the salaries of State officers, it would be taking money of the State by which it intended to procure the services of effective officers. It would be taking money which had been paid by the taxpayers of the State for carrying on the State government and which had been paid to the officers of the State for the necessary expenses of obtaining their official services. Raising money by taxation and employing salaried officers are ordinary instrumentalities of government. The exaction of an income tax from a State officer would be but a method of diverting the revenue of the State to the revenue of the General Government. It is manifest that if the General Government could take a part of the salary of a State officer through the instrumentality of taxation, and a State could take a part of the salary of a national officer, there being no limitation which the judiciary can impose upon the extent of the taxing power, there would be no limitation upon the retaliatory extent to which it could be pushed. In this case now before us the money exacted by the United States was not paid by the taxpayers of South Carolina, but by purchasers at its dispensaries; and it was not expended for ordinary governmental purposes, but as incident to carrying on its commercial business. The court does not question the power of the State to carry on this business, and does not doubt that the proceeds of the business lessen the taxes of the taxpayers. All that it decides is that the business of the dispensaries was, intrinsically, business and not government; and being business was subject to the same national tax which is borne by all other persons engaged in the same business.

The third distinction is that in the income-tax case of The Collector *v.* Day (11 Wall. R., 113) the money being raised for governmental purposes and expended for governmental purposes, the purposes, though not defined, were in their nature limited. Here, if the principle contended for is established, there seems no limitation upon the extent to which it can be carried. If the State, because it is a State, can buy and sell without being subject to the internal-revenue tax which is borne by other persons who buy and sell, at what point can it be held that exemption from taxation ceases? It is contended by many writers that the substitution of beer and wine for distilled liquors will satisfy the craving for alcohol on the one hand and relieve abnormal humanity from its vices and evils on the

other hand. If the State in the exercise of its police power should determine that an effective remedy for alcoholism would be the substitution of the light wines of Europe for whisky and brandy, would it be at liberty to import and claim exemption from customs duties? It is generally believed that many of the evils of alcoholism are caused by impurities in the liquor sold, by improper manufacture, by the mixing and flavoring which bring poisonous matter into the liquor. If the State, in the exercise of its police power, should deem it for the general welfare to furnish its citizens with pure distilled liquors, and for that purpose to manufacture as well as sell, would it be exempt from the distiller's tax? The amounts paid for licenses, set up in this suit, are trivial. The exaction of them will only theoretically affect the dealer's price, but the saving of the distiller's tax would, in effect, be an enormous bounty in favor of the State. The State could sell beyond its own borders, or at least could sell to its own citizens, who could sell beyond its own borders. To be able to sell free from taxation would be a power that would break down all competition wherever the State chose to compete. The more this subject is studied the more clearly it appears to the court that the State has a right to the exercise of its police power, and a right to the use of all proper instrumentalities of government, and a right to enter into this commercial business of buying and selling for a profit; but that none of these rights can be exercised as an evasion of the National Government's right to impose an excise tax and to subject all persons, whether States or private corporations or individual dealers, to the same law.

There are a number of minor questions in the case which were exhaustively argued by counsel on both sides, such as (on the part of the defendants) that the claimant should have presented its claim to the Commissioner of Internal Revenue for the remission of the tax as illegally collected; such as (on the part of the claimant) that the statute (14 Stats. L., p. 163, § 44) imposing this excise uses only the term "corporation," and was not intended to apply to a State. But it seems plain, if a State is a power above and exempt from the operation of the revenue laws, that it can not be compelled to resort to them for redress; and, conversely, that if a State is not a power constitutionally exempt from all national taxation in its commercial transactions, but is, like other persons and corporate bodies, subject to the conditions which the law imposes, the court can not read into the statute an exemption which is not needed by reasonable construction or by the ordinary principles of justice, and which will be an arbitrary departure from the plain, positive language of the statute. The great question in this case is whether the United States can impose an excise tax upon a State when the State carries on a commercial business for profit, a business which, in the hands of any other person or body corporate, will be subject to the terms and conditions of the Federal revenue laws. Not until the chief, the fun-

damental, question in the case is disposed of can a decision be intelligently given upon the minor questions presented.

The court has not overlooked the fact that in one instance a State was carrying on an ordinary commercial business, owning and operating a railroad, and that one court of the United States held that it was not intended that a State should be included in the requirements of this statute by the term "corporation" (State of Georgia *v.* Atkins, collector, 35 Ga. R., 315), and that the decision has been referred to in an indirect way by one of the judges of the Supreme Court (United States *v.* Railroad Company, 17 Wall. R., 322, 328). But this court is constrained to say that the magnitude of the present question was not presented to the court in Georgia and was not considered, and that the question involved there was not involved in the case in the Supreme Court, where all that was held was that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues. But, as was said by two of the dissenting judges in that case (p. 334), "it by no means follows that the private property owned by such corporation," "and used merely in a commercial sense for the income, gains, and profits, is not taxable just the same as property owned by an individual, or any other corporation." Such decisions as in The Republic of Honduras *v.* Soto (112 N. Y. R., 310) and Salt Lake City *v.* Hollister (118 U. S. R., 256) admonish us that such terms as "person" and "corporation" are broad enough in statutory construction to include the corporate side of a government or municipality. The principle which rules and guides is this: The exemptions of sovereignty extend no further than the attributes of sovereignty.

The judgment of the court is that the petition be dismissed.

WRIGHT, *J.*:

I concur in the conclusion but not in all that is said in the foregoing opinion.

26 X.—*Judgment of the Court.*

THE STATE OF SOUTH CAROLINA
vs.
THE UNITED STATES. } Nos. 22554, 23100, and 24085, Consolidated.

At a Court of Claims held in the city of Washington on the 29th day of February 1904 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order adjudge and decree that the claimant's petition be dismissed.

BY THE COURT.

27 XI.—*Application for and Allowance of Appeal.*

THE STATE OF SOUTH CAROLINA
v.
THE UNITED STATES.
} Nos. 22554, 23100, and 24085, Consolidated.

From the judgment rendered in the above cause on the 29th day of February 1904, in favor of the defendants, the claimant by its attorney, on the 4th day of March 1904 makes application for, and gives notice of an appeal to the Supreme Court of the United States.

FRANKLIN H. MACKEY,
Attorney of Record.

Filed March 4, 1904.

Ordered. That the foregoing appeal of the claimant be allowed as prayed for.

BY THE COURT.

28 In the Court of Claims.

THE STATE OF SOUTH CAROLINA
vs.
THE UNITED STATES.
} Nos. 22554, 23100, and 24085, Consolidated.

I John Randolph assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of pleadings in the above entitled cause, of the orders consolidating said cases—of the findings of fact and conclusion of law filed by the court, of the opinion of the court and concurring opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 18th day of March A. D. 1904.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,274. Court of Claims. Term No. 210. The State of South Carolina, appellant, *vs.* The United States. Filed March 18th, 1904. File No. 19,274.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 22 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210. /O.

THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANT.

FRANKLIN H. MACKEY,
Attorney for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12944

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210.

THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of the Case.

The claimant (appellant) began this action by a petition filed in the Court of Claims on the 27th day of June, 1901. Subsequently, to wit, on the 13th day of September, 1901, the claimant, by leave of the court, filed in lieu of its original petition an amended petition addressed to said court and setting forth as follows:

"1. That by an act of the legislature of South Carolina, approved December 24 1892, with subsequent amendments thereto, commonly known as the dispensary law, the sale of spirituous and malt liquors by private persons has been prohibited throughout said State since the 1st day of July, 1893, when said act went into effect, and the authority to make sales thereof is confined exclusively to the State and county dispensers provided for by said act; said dispensers

are, by said law, made the agents of the State for making sales of such liquors, which liquors are the property of the State, and the manner of sale is regulated by the said dispensary law; that the said liquors are sold by said dispensers only at appointed places in the State, known and designated as dispensaries, and the proceeds of said sales belong to the State; that by said dispensary law the said dispensers were, and are, prohibited from making, and they have not at any time made, any sales of spirituous or malt liquors other than of those belonging to the said State, and that all the profits and losses arising from the said sales accrue to the said State alone; that the said dispensers were, and are, salaried officers of said State, and never had any proprietary interest whatever in said liquors, nor in the profits or losses accruing from said sales, and that their salaries have never depended upon the amount of sales made by them; that the said dispensers were and are the State's appointed agents or instrumentalities to carry out its dispensary laws, which laws have for their purpose the control and the minimizing, as far as practicable, of the evils of the traffic in spirituous and malt liquors throughout said State; that said State exercises said control under and by virtue of its police power. Petitioner further avers that neither said dispensary officials nor said State are liable to pay any taxes, special or otherwise, to the United States under the revenue laws thereof, either as wholesale or as retail liquor dealers, and that they were not at any time, nor are they now, liquor dealers within the meaning of said revenue laws.

"2. That notwithstanding the premises, the United States collector of internal revenue for the State of South Carolina has for each and every year since, and including the year commencing the 1st day of July, 1893, when said dispensary law first went into effect, refused to permit the said dispensers to make any sales of spirituous or malt liquors, as by the statutes relating to said dispensaries they were required to make, unless, and until, each and every of said dispensers paid to the United States the special tax of twenty-five dollars a year imposed by the revenue laws of the United States upon retail liquor dealers, and he further required the State dispenser to pay in like manner for each and every year a special tax of one hundred and twenty-five dollars, the said collector claiming that said State dispenser was a wholesale, as well as a retail, dealer in liquors; and your petitioner

says that the said taxes were accordingly, and only because of said requirement, paid by the State dispenser for himself and for each and every of said dispensers to the said collector, the same being paid out of the funds of said dispensaries, which funds were, and still are, the property of the State of South Carolina; that said payments were made without the authority of any law of the State of South Carolina or of the United States, and were unauthorized by your petitioner; that the sums so paid to the collector of internal revenue as special taxes now amount to twenty thousand dollars, and that said money has been paid over by the said collector to the United States by its direction, and the same has been turned into its treasury. Your petitioner accordingly avers that the money so paid by the said dispensers being the money of the State, paid as aforesaid, without its authority, and without being liable to pay the same, was had and received by the United States to the use of your petitioner, and the same is legally and equitably now due and payable to your petitioner by the United States.

"Wherefore your petitioner demands judgment against the United States for the said sum of twenty thousand dollars."

Subsequently, on the 5th of November, 1902, the claimant filed a second petition containing like allegations to recover money paid under the like circumstances from the 1st day of July, 1901, to the 30th day of June, 1902; and a third petition was in like manner filed on the 9th day of October, 1903, to recover the sums paid under like circumstances "for each and every year since and including the year commencing the 1st day of July, 1901." Thus the three petitions cover the entire period of payment from the 1st day of July, 1893, to the 30th day of June, 1904, the said alleged "special taxes" having been paid in advance on the 1st day of July of each and every year since the 1st day of July, 1893.

The sum so paid to and received by the United States, as shown by the fourth finding of fact (Rec., 10), amounts to $22,840.71, for the years commencing July 1, 1895, to July 1, 1903; the sums for the years commencing July 1,

1893, and July 1, 1894, at which dates they were respectively paid, being barred by the statute of limitations.

These three petitions were consolidated under its rules by the court below and the cases heard as one case, and they have been appealed as such.

The principal questions involved in the case are:

First. Whether the internal-revenue laws apply to a State, or its agents as such; and,

Secondly. If so, whether the so-called dispensary law of the State of South Carolina is a police law within the meaning of that term; and, if so,

Thirdly. Whether the agents and instrumentalities appointed by the State to administer and enforce these police provisions can, as such, be taxed as liquor dealers under the internal-revenue laws of the United States, or in any manner whatsoever as such agents and instrumentalities.

Only in the event of the first of these questions being decided against the State does it become necessary to consider the others.

The Provisions of the Dispensary Law.

It is contended by counsel for the appellant that the provisions of the dispensary law of the State of South Carolina show it to be a police law of the highest character. No better synopsis of its provisions can be given than that to be found in the opinion of the supreme court of South Carolina in the case of State *ex rel.* Aiken, 42 So. Ca., 222, 239, which is as follows:

"The title of the act is, 'An act to declare the law in reference to and further regulate the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors, within the State of South Carolina, *and to police the*

same.' The act provides that 'all such liquors, except when bought from a State officer authorized to sell the same or in possession of one, are declared to be contraband, and against the morals, good health, and safety of the State, and may be seized whenever found,' etc. The governor, attorney general, and comptroller general shall *ex officio* constitute a State board of control to carry out the provisions of this act. The act provides for the appointment of a commissioner, who shall purchase all liquors for lawful sale under such rules and regulations as may be made by the State board of control, and furnish the same to such persons as may be designated as dispensers thereof. All liquors shall be tested by the chemist, and declared to be pure, before sale to the county dispensers. The State board of control shall appoint a county board of control, composed of three persons, who shall appoint certain officers known as 'county dispensers.' The dispensers can only sell by the package, which cannot be broken nor the liquor drunk on the premises where sold.

"The act shows that the legislature had in view the protection of the 'morals, good health, and safety of the State' in dealing with this question. Many safeguards are thrown around the sale of the liquor. The commissioner is to be an abstainer from intoxicants. The liquor is to be tested by the chemist and declared to be pure. The liquor is to be sold only by the package, which cannot be opened nor drunk where sold. The sales can only be made in daytime. Persons cannot be appointed on the county board of control who are addicted to the use of intoxicating liquors. No person can be appointed a county dispenser who has ever been adjudged guilty of violating the law relating to intoxicating liquors, nor who is keeper of a restaurant or a place of public amusement, nor who is addicted to the use of intoxicating liquors as a beverage. The county dispenser shall execute a bond in the sum of $3,000, upon which suit for damages may be brought for a violation of the provisions of the act by a wife, child, parent, guardian, employer, or other person. A majority of the voters in a township may prevent the establishment of a dispensary. The county dispenser shall take an oath therein prescribed. A printed or written request must be presented for permission to purchase. The sale shall not be made to a minor, a person intoxicated, a person in the habit of drinking to excess, nor to any person unless known to the dispenser. It prevents

the establishment of club rooms where liquors are sold. One of the beneficial results of the law is brought about by selling only for cash."

Ever since the dispensary law went into effect the United States collectors of internal revenue for the State of South Carolina have, as we have seen, refused to permit the dispensers to make any sales of liquors until they paid to the United States the special tax of twenty-five dollars a year imposed by the revenue laws of the United States upon retail liquor dealers, and they further required the State dispenser to pay in like manner a special tax of one hundred and twenty-five dollars a year as a wholesale and retail dealer in liquors. These taxes were accordingly paid by the State dispenser, for himself and the county dispensers, to the collector out of the funds of the dispensary and the money has been paid over by the latter to the United States and has been covered into its Treasury.

The case, having been argued by counsel, was duly submitted, and the Court of Claims on the 29th of February, 1904, filed its findings of facts and, as its conclusion of law thereon, dismissed the petition.

The Claim of the State.

The claim of the State is:

1st. That the provisions of the Internal Revenue Act do not apply, and were never intended by Congress to apply, to a State of the Federal Union.

2d. That the dispensary system, being a legitimate exercise by the State of its police power, and its agents being but the instrumentalities of the State to enforce its provisions, the implied limitations of the Federal Constitution forbid their taxation by the United States, even had Congress intended the internal-revenue laws to extend to them.

ARGUMENT.

The provisions of sections 3232 and 3244 of the Revised Statutes apply to "persons" and not to a State of the Federal Union or its instrumentalities of government.

By section 3232 it is provided that:

"No person shall be engaged in, nor carry on, any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Then by section 3244 it is declared that "retail dealers in liquors shall pay twenty-five dollars." The words "retail dealers in liquors" are defined in the next paragraph as follows:

"Every *person* who sells or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded *as a retail dealer in liquors.*"

The meaning of this word "person," wherever it occurs in the internal-revenue acts, is defined by section 3140 of the Revised Statutes as follows:

"SEC. 3140. * * * Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include partnership, association, company or corporation, as well as a natural person."

The forty-fourth section of the internal-revenue act of July 13, 1866, had a similar defining clause, as follows:

* * * "Any word or words in any and all parts of this act, and all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include

partnerships, firms, associations, *bodies corporate or politic*, or any other party whatsoever, when not otherwise designated, or manifestly incompatible with the intent hereof."

It will be observed that the section just quoted contains the words "bodies politic or corporate," a phrase which is not to be found in section 3140 of the present revenue act; the word "corporation" being substituted for it. This is important to be borne in mind, as will appear when we come to inquire into the *intent* of Congress in changing the phraseology of the later act.

The proposition which we now wish to submit is that *the word "person," as contained in section 3140, does not mean a State and was not intended by Congress to mean such.*

Every Attorney General of the United States before whom the question has come has so decided.

Four Attorneys General of the United States—Stanbery, Browning, Hoar, and Ackerman—have given to the Secretary of the Treasury written opinions, declaring that the word "person" in the act of 1866 did not include, and was not intended to include, a sovereign State of the Union.

On June 28, 1867, the question was referred by the then Secretary to Attorney General Stanbery in the case of "The Alabama Certificates," 12 Opinions, 176. I quote from his opinion:

"It would in my judgment be going further than is allowable to apply the terms bodies corporate or politic even to such a subordinate corporate body as a city. Although such bodies politic and corporate as private corporations are often held to come under the description of *persons*, I have never met with a case in which it was held that such a public corporation as a *State* could be described as a *person*. Consider that, in this declaratory clause, the legislature undertook to make its meaning clear by precise enumeration, and says in effect, that the word person, wherever used in this act, 'shall be taken to include partnerships, firms, asso-

ciations, bodies corporate or politic or other party whatsoever.' The term 'bodies corporate or politic' is the only one to include a merely private corporation, and it does not include all artificial persons of that character. Now, if it was the purpose of Congress not only to include such corporations as are not private in their foundation, but to embrace other corporations usually called public corporations, certainly that purpose would have been expressed.

"And if it was intended to include a State, why not say a State without any circumlocution? If it was intended to include a city, why not name it? But here a State or a city is not named, nor is there the usual term of description, to wit, a *public* corporation used to embrace them."

He accordingly held that the certificates or receipts issued by the State of Alabama, under authority of an act of its legislature, were not subject to the 10 per cent. tax imposed by the act of July 13, 1866, which taxed the notes "of any person" as well as the notes of a State bank or State banking association.

Again, on October 14, 1867, Mr. Stanbery endorsed this construction of the internal-revenue acts in answer to two questions propounded him by the then Secretary of the Treasury, the Hon. Hugh McCulloch, to wit:

"First. Whether railroads, owned exclusively by a State and operated by its own agents fall within the provisions of the internal-revenue act of June 30, 1864.

"Second. Do articles manufactured by convict labor in the penitentiaries or prisons of a State, for the State, come within the internal-revenue taxation?"

These questions he answered in the negative in an elaborate opinion, in which he held that the revenue acts have no application to *a State or the property of a State.* (See 12th Opinions, 277, "Taxation of State Railroads and Manufactures.")

On March 30, 1868, Attorney General Browning replied to a question submitted to him by the Secretary of the Treasury, to wit, whether the Detroit House of Correction in

manufacturing articles by convict labor for the use of the State was a "manufacturer" within the meaning of the internal-revenue laws. The previous opinions by Attorney General Stanbery were referred to as to the meaning of the word "person" in the revenue laws, and the same conclusion was arrived at by him. (See 12th Opinions, 376.) And in the "Case of the Hartford National Bank," 12th Opinions, 402, Attorney General Browning again announced a similar view of the statute.

On June 2, 1869, Attorney General Hoar was submitted a like question, and in an elaborate review of the opinions of his predecessors he came to a like conclusion (13th Opinions, 67), and June 3, 1871, Attorney General Ackerman delivered a like opinion (13th Opinions, 439).

The Federal courts have always held that the internal-revenue act does not apply to a State of the Federal Union.

But we are not confined to the opinions of the chief law officers of the Government. The question has been judicially answered by the courts. In Georgia *vs.* Atkins, a case decided in 1866 by the circuit court of the United States for the Georgia circuit, but reported in 35 Ga. Rep., 315, it was contended by the collector of internal revenue that the Western and Atlantic railroad, which was owned and operated by the State of Georgia, was liable to pay a tax of $6,004.56 under the revenue laws of the United States taxing the gross receipts of railroads. An injunction being applied for, Erskine, J., granted it, saying, in delivering the opinion of the court: "The question, narrowed to a point, is this: Does the word or term 'corporation,' for the purposes of the act and as herein used, include the term 'State?'" The learned judge considered the question at some length and then said:

"I am of the opinion that Congress intended the term 'corporation' as used in this act to be understood in its general obvious and natural meaning; and therefore it does not include the term 'State.' And so far as my limited researches go, I am unable to discover a single case in the Supreme Court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term 'corporation'—body corporate or politic—when used in a statute includes a 'State,' or where the one term is used as a synonym for the other."

The Supreme Court of the United States has continuously held that the internal-revenue laws have no application to a State.

In United States *vs.* The Baltimore & Ohio R. R., 17 Wall., 322, where the constitutional question of the right of the Federal Government to tax the property of a State is elaborately considered and the right denied, Mr. Justice Hunt, delivering the opinion of the court, said:

"The term corporation as used in the acts of Congress touching internal revenue does not include a State" (citing Georgia *vs.* Atkins, *supra*).

Again he cites and quotes this language from 12 Opinions Attorney General, 176:

"The term person as used in §§ 9 and 44, *does not include a State.* The receipts or certificates issued by the State of Alabama are not subject to the tax of 10 per cent. imposed by the act of Congress of March 25th 1867."

And Mr. Justice Bradley, in his concurring opinion in the same case, said:

"I concur in the judgment of the court in this case, without deciding whether Congress can or cannot tax the property of a municipal corporation, I concur in the judgment on the ground that *Congress did not intend by the internal-revenue laws to tax property belonging to States.*"

Van Brocklin vs. State of Tennessee, 117 U. S., 151.

The Van Brocklin case was the converse of the case in 17 Wallace. It was there held, reaffirming all the previous decisions, that "property of the United States is exempt by the Constitution of the United States from taxation under the authority of a State." Turning to the converse of the proposition, Mr. Justice Gray, speaking for the court, said:

"The cases in which this court has held that the United States have no power under the Constitution *to tax either the instrumentalities or the property of a State* have a direct and important bearing upon the question before us."

He then refers to the cases of Collector *vs.* Day, 11 Wall., 113, and Dobbins *vs.* Erie County Commissioners, 16 Pet., 435, and proceeds:

"Applying the same principles, this court in United States *v.* Railroad Co., 17 Wall., 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States."

Then in anticipation, seemingly, of the very argument advanced by the Court of Claims in its opinion in this case, viz., that, when the property taxed is held by the State for the mere purpose of *profit*, such tax is valid, the opinion of the Supreme Court proceeds as follows:

"The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific use, nor derived from property held by the State or by the municipal corporation for any specific *public use*, but were part of the general income of that corporation, held for the public use in no other sense than all property and income

belonging to it in its municipal character, must be so held. The reasons for exempting *all property and income of a State*, or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the National Government from State taxation."

Congress has practically declared by its subsequent legislation that the Federal revenue laws do not apply to a State.

It is interesting, however, to note that Congress itself by leaving out the words "bodies corporate or politic" in the later revenue act gave strong evidence of its intention to put the question at rest, since no one will contend that any words in the later act are more comprehensive than those omitted words, which have been held not to include a State.

Moreover, Congress on several occasions where the statute of limitations had supervened has *refunded* to cities and towns (which are constituent and aliquot parts of a State, 17th Wall., 322) taxes erroneously paid by them under the revenue law. (See United States *vs.* City of Louisville cited *ante.*) Of course if Congress had been of the opinion that the revenue laws applied to a State these refunding acts would not have been passed.

Appellant claims judgment on the ground that the word "person" as used in the Revised Statutes does not include a State.

With this consensus of opinion on the part of the legal advisers of the Government, the Supreme and circuit courts of the United States and of Congress, and also of the Revenue Office itself, as will appear elsewhere in this brief, I would be justified in leaving the question here; for if the States of the Union cannot be considered as having been regarded as ob-

jects of taxation by Congress when it passed the internal-revenue act, it follows that it is quite immaterial to the issues in this case whether Congress has or has not the constitutional power to tax a State, since it did not intend to do so. The claimant should therefore have been given judgment, and asks for it now, on the ground that the word "person" as used in the revenue act does not include a "State" of the Federal Union.

I shall, however, show that even had Congress intended to include a State, or its agents or instrumentalities, within the revenue laws as objects of taxation, such intention would have been futile, since there is no grant of such a power in the Federal Constitution. A power not expressly or impliedly granted by the Constitution is forbidden by it. The next proposition, therefore, is that:

The Constitution contains no grant of power to Congress, express or implied, to tax a State or its means and instrumentalities of government; and the exercise by Congress of a power not expressly or impliedly granted by the Constitution to it is impliedly forbidden.

This principle is well stated by Judge Cooley in his well-known work—Cooley's Constitutional Limitations—where, in speaking of the implied limitations of the Federal Constitution, he says:

"One of the implied limitations is that which precludes the States from taxing *agencies whereby the General, i. e.* [Federal], *Government performs its functions.* The reason is that, if they possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operation of the national authority within its proper and constitutional sphere of action. 'That the power to tax,' says Chief Justice Marshall, 'involves the power to destroy; that the power to destroy may defeat and

render useless the power to create; * * * are propositions not to be denied'" (Cooley, Const. Lim., *480).

And then of the converse of this doctrine he says:

"If the State cannot tax the means by which the National Government performs its functions, neither on the other hand and for the same reasons, can the latter tax the agencies of the State governments. The same supreme power which established the department of the General Government determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the Constitution which limits them, and independent of other agencies except as thereby made dependent. There is nothing in the Constitution of the United States which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference *by the indirect means of taxation* is quite as much beyond the power of the national legislature as if the interference were *direct* and extreme. * * * If the States possessed the authority to tax the agencies of the National Government, they would hold within their hands a constitutional weapon which factions and disappointed parties would be able to wield with terrible effect when the policy of the National Government did not accord with their views; while, *on the other hand*, if the National Government possessed a corresponding power over the agencies of the State governments, there would not be wanting a man who, in times of strong party excitement, would be willing and eager to resort to this power as a means of coercing the States in their legislation upon the subjects remaining under their control" (Cooley, Const. Lim., *483).

This doctrine is abundantly supported by the decisions of the Supreme Court of the United States, beginning with McCulloch *vs.* Maryland, 4 Wheaton, 316, 432, where the opinion was delivered by Chief Justice Marshall, and ending with the last utterance of the court upon the subject, in 1898,

in Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429—the memorable Income-tax case.

Thus in Collector *vs.* Day, 11 Wall., 113, we find the court using the following language through Mr. Justice Nelson:

"In respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are necessarily and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of the Government. In both cases the exemption rests upon necessary implication, and is applied by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power can tax them at discretion?"

In that case the collector of internal revenue had assessed a tax upon the salary of Judge Day, a judicial officer of the State of Massachusetts, and the Supreme Court, upon the principle above quoted, held that such a tax was equivalent to a tax upon the court, and thus upon the State's instrumentalities of government, and as illustrative of the extent to which this power of taxing governmental agencies may be exercised if it be once admitted the learned justice quotes this forcible language of Chief Justice Marshall in McCulloch *vs.* Maryland, 4 Wheaton, 316, 432:

"If the States" [and the same reasoning, we have seen, applies to the National Government in its taxation of State instrumentalities] "may tax one instrument employed by the Government in the execution of its powers they may

tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of Government."

So in Pollock *vs.* Farmers' Loan and Trust Co. (Income-tax case), 157 U. S., 429, it was said:

"The Constitution contemplates the independent exercise by the nation and the State severally of their constitutional powers. As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

And in its opinion rendered upon the second hearing it reaffirmed this doctrine.

By no subterfuge of language or indirection of phraseology can the limitation upon the taxing power be evaded. It is the substance and not the shadow that is to be regarded.

"If," said the Supreme Court in the case just above cited, "it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. * * * But constitutional provisions cannot be thus evaded. It is the substance and not the shadow which controls, as has indeed been established by repeated decisions of this court."

And then, with an industry commensurate with the importance of the subject, the learned justice delivering the opinion shows how in Brown *vs.* Maryland, 12 Wheat., 419, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void; and how, in Weston *vs.* Charleston, 2 Pet., 449, it was held

that a tax on the income of United States securities was a tax on the securities themselves; how, in Dobbins *vs.* Erie County, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt; how, in Almy *vs.* California, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; how, in Northern Central R. R. *vs.* Jackson, 7 Wall., 262, a tax upon the interest payable upon bonds was a tax not upon the debtor but upon the security; and, in Cook *vs.* Pennsylvania, 97 U. S., 566, how a tax upon the amount of sales of goods made by an auctioneer was held to be a tax upon the goods themselves, and we have already seen that it has been held that a tax upon the processes of the court or the salaries of its officers was a tax upon the court itself, and thus, *indirectly*, upon the State. So, too, only recently, at its last term, the Supreme Court, in the case of United States *vs.* Fairbank, 181 U. S., 283, has held that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports and in conflict with the constitutional prohibition.

One of the leading cases illustrating the limitations upon the power of Congress to tax State instrumentalities is that of United States *vs.* Balt. & O. R. R., 17 Wall., 322, heretofore cited. In that case it was said:

"The right of the States to administer their own affairs through their legislative, executive and judicial departments in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence the beginning of such taxation is not allowed on the one side and is not claimed on the other."

Upon the principles thus laid down the court held that the city of Baltimore, as a municipality, is *a portion of the governmental power of the State of Maryland*, and therefore a United States internal-revenue tax of 5 per cent. upon the interest of bonds held by the city for moneys loaned by the city was unconstitutional.

"It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, *are not proper subjects of the taxing power of Congress*" (Veazie Bank *vs.* Fenno, 8 Wall., 533; Buffington *vs.* Day, 11 Wall., 115; Dobbins *vs.* Erie Co., 16 Pet., 435; also an excellent and elaborate note in 23 U. S. C. C. of Appeals ("C. C. A.," 515) upon the limitations of the taxing power from mutual interference of Federal and State Governments).

We may consider it, therefore, as settled as the hills that the Supreme Court will never depart from its unvaried ruling that State property and State instrumentalities in the administration of its government cannot be taxed, directly or indirectly, by the Federal Government.

Some well-considered cases from the State courts are:

Warren *vs.* Paul, 22 Ind., 276.
State *vs.* Gaston, 32 *ib.*, 1.
Jones *vs.* Keep, 19 Wis., 390.
Sayler *vs.* Davis, 22 *ib.*, 225.
Union Bank *vs.* Hill, 3 Coldw. (Tenn.), 325.
Fifield *vs.* Close, 15 Mich., 505.
Smith *vs.* Short, 40 Ala., 385.
And see also Freedman *vs.* Sigel, 10 Blatchf. C. C., 327.

When, therefore, it is claimed that under the internal-revenue laws of the United States the dispensers, who are the agents of the State of South Carolina to conduct and

carry out its dispensary law, must each pay a tax to the United States before being permitted to exercise the duties of their office, the answer is, that if the revenue law so declares, then the law is unconstitutional and void in this particular, because the tax which it imposes is a tax upon the instrumentalities by which the State, through its laws, seeks to minimize the evils of the liquor traffic within its borders—in other words, it is a tax upon the exercise of a valid police power.

"The power to tax includes the power to destroy;" therefore the police power, like the judicial power of a State, may be destroyed by Congress under the guise of taxation, if the right to tax it exists at all.

If Congress can tax the instrumentalities chosen by the State to carry out its police power, then, under the plea of the right to tax, it may tax the dispensary agents so heavily as to prevent them holding the office, and thus tax them out of existence, as it did the State banks. This would be nothing less than the power to destroy a governmental function. The point is forcibly presented by the court in Fifield *vs.* Close, 15 Mich., 505, where, in holding that so much of the revenue law as required process in State courts to be stamped as a condition to the validity of legal proceedings, is unconstitutional and void, the court said:

"If Congress has the right to impose a duty or tax upon suits in courts of the States, it follows, as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. *And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the State.*"

Of course in the case at bar our contention is that Congress never *intended* to include a State or its instrumentali-

ties of government within the provisions of the internal-revenue law as objects of taxation; it will only be when the court finds that we are wrong in that contention that a question similar to that suggested by the supreme court of Michigan in the above case will become the *real* question before this court, viz:

Can Congress put an end to the exercise by a State of its police power?

There is but one answer, of course, to that question.

The Practice of the Internal Revenue Office.

The Internal Revenue Office, even while it was demanding and receiving this tax from the dispensary officials, has had before it from time to time a great many cases in which this constitutional question of the limitation upon the taxing power of the United States over State instrumentalities arose in one form or another, and it has invariably conceded the principle now contended for.

I briefly note the following rulings, to be found in the annual report of the Internal Revenue Commissioner for 1898, at page 88, upon questions arising under that provision of the revenue law requiring certificates "of every description" to have a ten-cent revenue stamp affixed thereon:

"Certificates of officers of the United States given in the discharge of official functions necessary in carrying on the machinery of the Government are not liable to tax."

"Certificates issued by an officer of the State, in the interest of the State, are not liable to tax."

"Returns of birth, certificates of death, and certificates of the registrar as to the facts declared concerning birth, marriage and death are none of them held to be subject to the stamp tax imposed upon certificates in view of the fact that these certificates are given *in pursuance of State laws for public purposes.*

"Certificates issued by the health officer of New York, under State statute, relative to the employment of children,

are exempt, being issued in the discharge of a duty connected *with the operations of the Government.*

"A mercantile license, or *liquor dealer's license*, being a certificate required by the laws of a State, or ordinance of a city, *in the exercise of governmental functions* comes within the exception."

It is somewhat singular, therefore, that there should have been this anomalous and extraordinary departure in the dispensary cases. Especially may we call it anomalous and extraordinary in view of the decision of one of the ablest of the Internal Revenue Commissioners—Hon. Columbus Delano—in what is called the "Maine liquor law cases." This decision I find reported in volume XI, page 145, of the Internal Revenue Record, and I quote the whole of it because of its direct application to the present case:

"OFFICE OF INT. REVENUE,
"WASHINGTON, *April 30th*, 1870.

"C. C. ESTY, Esq.,
"*Assessor, Framington Mass.*

"SIR: D. J. Wetherbee, of Acton, Mass., in your district, writes under date of the 9th of March last, to this office as follows: 'I am a town agent for the town of Acton to buy and sell intoxicating liquors, and should like to know if I am liable to pay for, and procure a special license (special tax) to retail liquor?'

"He has been referred to you for information, and you are accordingly advised that after a careful reconsideration of this question, the office has decided to return to the old ruling upon the subject, published on page 45, of vol. V of Internal Revenue Record, which reads as follows: 'No special tax as liquor dealer is required of a county, city, or town agent appointed under what is popularly known as the "Maine liquor law" for sales made in strict accordance with the provisions of said law.'

"It is understood that under such a law the liquors are both *purchased and sold by the town*, the agent having no property in them; that a loss upon the liquor would be the loss of the town and not of the agent, this act of buying and selling being performed like all other acts of towns, etc.,

through the medium of authorized agents, and that the agents' pay does not depend upon the amount of sales.

"The late ruling of the office (p. 121, vol. X of Int. Rev. Record) which held such agents liable to special tax as liquor dealers is hereby revoked.

"C. DELANO,
"*Commissioner.*"

I know of no ruling of the office in conflict with this decision except that (made by a deputy commissioner) which it expressly refers to and overrules.

The dispensary cases are the "Maine liquor law cases" over again. The facts are identical. Why, then, should not the ruling of the Internal Revenue Office be the same in both instances?

The Commissioner of Internal Revenue has therefore in taxing the dispensary agents overruled the long-recognized practice of his office. It is said as some sort of an excuse for this action that if the State may exercise its police power over spirituous liquors by selling them through the dispensary system it may for the same reason *manufacture them* and be immune from taxation; that this will prove a tremendous loss of revenue to the Government, &c. Thus an apprehended loss of revenue is made paramount to a question of principle. We may imagine the taxing officer soliloquizing: "The amount of revenue to be lost is very large, the constitutional principle is—well, not quite so large."

Such an argument is not to be addressed to this tribunal. But I may be permitted to say that if the South Carolina dispensary system were adopted by every State of the Union the loss to the Federal revenue could be many times made up from other sources created by the increase in the moral and financial well-being of the whole country through the enforcement of this the only sensible and practicable legislation for the minimizing of the enormous evils of an unrestrained liquor traffic.*

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* See Appendix No. 3, *post.*

As to the question of its manufacture by the State, that is not before the court. If it ever gets here it will be time enough to consider it.

Jurisdiction.

No point is made in regard to the jurisdiction of the Court of Claims to hear and determine this case, nor could it well be made in view of the provisions of the act of March 3, 1887, ch. 359, 24 Sts., 505, giving jurisdiction to that court of "All claims founded upon the Constitution of the United States or any law of Congress except for pensions."

The United States holds the money collected from the dispensaries to the use of the State and must refund it.

The evidence shows that the special tax stamps were issued, not to the State, but to certain persons whose names appear thereon and who were described therein as "dispensers," and permitted to carry on the business of liquor dealers in certain places within the State described as "dispensaries," and while each stamp acknowledges the payment to have been made to the collector by the person named, yet, as matter of fact, it appears that the dispenser did not pay the money himself, but that each special tax receipt or special stamp tax, as it is sometimes called, was issued by the collector upon the filing with him of a so-called "special tax return," signed by the dispenser and accompanied by a warrant upon the State treasurer in favor of the collector, showing on its face the purpose for which it was drawn, namely, to pay the dispenser's tax as a liquor dealer. The evidence also shows that each warrant was paid by the State treasurer. We suppose it will be conceded that no statute of South Carolina at any time expressly or impliedly author-

ized the State officials to pay for this special stamp tax out of the funds of the State. The action of the State officials in thus applying the State's funds was based upon an honest mistake as to their duties. They believed the dispensaries could not be carried on legally without paying these special stamp taxes, and they believed that the money was required to pay the State's liability. This money has been paid by the revenue collector into the United States Treasury. To whom does it belong? The answer, of course, is that it is *ex æquo et bono* the money of the State of South Carolina. The United States holds it in good conscience to the use of the State.

Johnson's case, 17 Ct. Cl., 157.
Devlin's case, 12 Ct. Cl., 266.
United States *vs.* Bank, 96 U. S., 30.

In the case last cited the money had been obtained by the United States through the *fraud* of the bank's agent, who had paid into the U. S. Treasury the money of the bank to cover up his defalcation as a United States official.

In the case at bar it was obtained by an honest mistake. Fraud, accident, and *mistake* are alike equitable grounds of relief. Whoever has received money belonging to another by any of these three means is liable *ex æquo et bono* to refund it. It is plain, therefore, that the decision of the Supreme Court would have been the same had the money been obtained by mistake instead of fraud. Money paid under a mistake of law and not of fact by private parties cannot generally be recovered, but that doctrine does not apply to a State (Barnes *vs.* District of Columbia, 22 Ct. Cl., 366, 394); and see Wisc. R. R. *vs.* United States, 164 U. S., 190, where the doctrine of the Barnes case was affirmed.

The money in the case at bar has been unlawfully obtained from the State by mistake of all the parties. Can the United States, which has by legislative enactment (Rev. Stat., sec. 3210) compelled its agent—the collector—to pay it into

its treasury, say that it holds it *ex æquo et bono* to its *own* use, and not to the use of the State of South Carolina? If so, then the cases above cited must be considered bad law.

No appeal to the Internal Revenue Commissioner necessary—this is not a "revenue case."

If it be said that the money claimed here, having found its way into the Treasury of the United States, can only be recovered by complying with the provisions of sections 3226, 3227, and 3228 Rev. Stat., which provide for an appeal to the Commissioner of Internal Revenue, etc., the answer is, as we have already shown, that the internal-revenue act, of which these sections are but a part, does not apply to a State, and a consideration of these sections will confirm that view. The appeal, these sections declare, must be made "according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

The Secretary of the Treasury, in pursuance of this provision, has prescribed certain "regulations" or instructions to be complied with in presenting such an appeal. These regulations have the force of law (Maddox case, 20 Ct. Cl., 193, 198). They are in evidence, being printed on the blank "Form 46" (Exhibit C. H. F. No. 7), upon which these appeals are directed to be made. The most casual reading of them shows that the Secretary of the Treasury never himself contemplated that these "remedial statutes," as he correctly calls them, applied to a State. It is impossible for the State to comply with his "regulations." Thus the appellant is required to state that on such and such a day "he was engaged in the business of ——," etc. But the State was never engaged in the business of a wholesale or retail dealer in liquors within the meaning of the revenue laws.

Again, "that on the — day of —— he was *assessed* an internal-revenue tax of —— dollars, which amount *he* after-

wards, on the — day of ——, A. D. —, *paid* to —— ——, Esq., collector of internal revenue," etc. But the State has never been assessed and never *paid* such a tax.

And the appellant or his agent is required to swear to these statements.

In other words, the Secretary has made "regulations" for the refund of taxes *paid by the appellant himself*, while in the case at bar the State never *paid* nor authorized to be paid the money which it seeks to recover; nor, as we have seen, has the State ever been assessed this tax, and yet the "regulations" provide that "a claim for refunding should be made in the name *of the party assessed*," and section 3227 itself declares that "No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally *assessed* or *collected* shall be maintained until appeal," etc. Assessed against whom? Collected from whom? Why, the *person* who is to make the appeal. But no tax was ever collected from the State, though money of the State was without authority of law paid by the State's agent for a tax illegally charged against *him*—not against the State. The very *sine qua non* of the appeal is that it must be made *by the person against whom the tax was assessed and from whom it was collected.* Congress, of course, never intended the internal-revenue laws to apply to a State, and therefore provided a remedy only for those *persons* who might at some time complain of a tax "erroneously or illegally" assessed against or collected from them. The Secretary of the Treasury evidently had the same view of the statute when he prescribed these instructions or regulations. Can the State then be told that its remedy is to be found in these provisions and that they exclude it from a remedy which it might otherwise have had?

To appeal to the Commissioner would be a surrender by the State of the very point in controversy.

If the State should appeal to the Commissioner of Internal Revenue that appeal would be a *surrender* of her contention that she is not within the provisions of the internal-revenue law and never was assessed and never paid any tax, but that the dispensers were illegally assessed and paid this tax, though with the State's money, *and without the authority of the State so to do.* In other words, in order to get before the Commissioner, the State *must yield in advance the very contention upon which she bases her claim for relief.* This was made clear by the Supreme Court in Fassett's case, 142 U. S., 479, where Mr. Justice Blatchford, delivering the opinion of the court, said (p. 487):

"Under the administrative act, the libelant, in order to have the benefit of the proceedings thereunder, *must concede* that the vessel is imported merchandise, which is *the very question put in contention* under the libel."

And in De Lima *vs.* Bidwell, 182 U. S., 1 (one of the Insular cases), at page 178, in which the contention was whether the goods upon which an import tax had been assessed were *imported* or not—*i. e.*, whether they were taxable or not—the same reasoning was adopted by the court in answering the contention of the Government that the plaintiff should have appealed to the board of general appraisers under the customs administrative act, since by doing so he would have been compelled in his application to have *surrendered* the question that the goods were not imported. Mr. Justice Brown, in delivering the opinion of the court, quoted the above language of Mr. Justice Blatchford in the Fassett case as supporting the plaintiff's contention. Similarly, in the case at bar, the State does not admit that she is in any manner subject to any of the provisions of the revenue statutes. Her claim is based upon the Constitution, not upon the revenue

law. She claims the right, conceded to her, in common with her sister States, by the Federal Government, to come into the Court of Claims and sue for money had and received by the United States to her use, and she denies that there is any Federal statute which deprives her of that right and compels her to seek a remedy before a Government official who has power only to refund to the person who paid the tax within two years of the accruing of the cause of action, and, as we have seen, the State of South Carolina has never paid the collector any tax. What was paid, it is true, was the money of the State, but it was paid by persons having no authority of law to pay it, and was received by the collector of internal revenue with notice of that fact, and therefore its payment was not binding on the State.

The Dooley and De Lima Cases.

But conceding for the moment that a State is to be regarded as being within the purview of the revenue laws so far as appealing to the revenue office, we have yet to consider the effect of the decisions of the Supreme Court in two of the insular cases, decided May 27, 1901, Dooley *vs.* United States and De Lima *vs.* Bidwell, 182 U. S., 1. These cases, we submit, have finally settled the question and established the jurisdiction of the Court of Claims to entertain revenue cases. We have shown that this is not a revenue case, but merely an ordinary equitable claim for the recovery of money had and received. We therefore do not need the authority of the Dooley and De Lima cases to sustain the jurisdiction of the court; but should it be considered that the State was *assessed and paid* this tax, and therefore that the claim is within the category of "a revenue case," then we cite these insular cases to support the jurisdiction.

Special attention is invited to the first of these cases—Dooley *vs.* United States. All the authorities are there reviewed, and the doctrine of Nichols *vs.* United States, 7

Wall., 122, considerably modified if not overruled. In the Nichols case it was broadly stated that "cases arising under the revenue laws of the United States are not within the jurisdiction of the Court of Claims." But the Supreme Court in the Dooley case said: "The broad statement in the Nichols case that revenue cases are not within the cognizance of the Court of Claims, *if* still true" (note the force of the *if*), "must be accepted with material qualifications;" and, calling attention to its decision in De Lima *vs.* Bidwell, just previously decided, it said:

"In the Nichols case it was held that as there was a remedy by action against the collector expressly provided by statute that remedy was exclusive. In De Lima against Bidwell we held that, although no other remedy was given expressly by statute than that provided by the customs administrative act, there was still a common-law remedy against the collector for duties on goods not imported at all; *but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the Court of Claims.*"

The Dooley and De Lima cases constitute a complete answer to the contention that sections 3226, 3227, and 3228 (the material parts of which are printed below for the convenience of the court*) apply to the case at bar, and that

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* SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commis-

the remedy is by appeal to the Commissioner, and, if he rejects the appeal, by suit against the collector.

But the answer is found in principle as well as in authority, for if it be true that the revenue laws apply only to persons and not to a sovereign State, then these three sections, being a part of those laws, cannot, of course, be extended to include a State. Previous decisions, therefore, of the Supreme Court which have held that an appeal to the Commissioner of Internal Revenue is a precedent condition to the maintenance of a suit by a tax-payer *against the collector* (and we are suing here the United States and not the collector, nor are we suing as a *tax-payer*), even if they have not been overruled by the Dooley and De Lima cases, are to be largely differentiated from the case at bar.

The Nichols case, even if not overruled, is to be largely differentiated from the case at bar.

The Nichols case was a suit in which a *tax-payer*, namely, a *person*, was seeking relief in a customs case, but the State, we have seen, is not a tax-payer and is not a person; and

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sioner at any time within the period limited in the next section.

SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued:

* * * * * * *

SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: * * *

we have seen also that no case can be found which holds a State to be within the purview of the revenue laws.

Thus, in the Nichols case we find this language used by the Supreme Court in reference to those sections of the Revised Statutes providing for an appeal to the Commissioner of Internal Revenue:

"These laws [*i. e.*, sections] constitute a system which Congress had provided for the benefit of those *persons* who complain of illegal assessment of taxes and illegal exaction of duties."

And again in the same case:

"While the Government is desirous to secure the *citizen* a mode of redress against erroneous assessments or collections it says to *him*," etc.

And again:

"Can it be supposed that Congress * * * intended to give the *tax-payer* and importer a further and different remedy?"

And the Court of Claims in Boughton's case, 12th Ct. Cl., 330, referring to so much of the language of the Supreme Court in the Nichols case as broadly declared that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims," has said:

"Broad and decisive as is this language it must be considered and construed with reference to the issues raised and the points involved in that case, which of course did not present *all* the questions of jurisdiction which may arise *in a great variety of forms* in numerous cases of entirely different character under the revenue laws."

In the Boughton case the money of the claimant in the hands of the collector had been appropriated to the payment of an internal-revenue tax without the claimant's consent, just as the money of the State of South Carolina in the hands of the collector has been appropriated to the

payment of an internal-revenue tax without the consent of the State. In the Boughton case jurisdiction was taken, *though no appeal had been made to the Commissioner of Internal Revenue.* Indeed, the Boughton case does not present as strong a state of facts as the case at bar, for there the claimant *himself* had placed the money in the hands of the collector, while here the money was obtained from the State's treasury unlawfully and without the authority, express or implied, of the State.

Nor can the unauthorized acts of the State's officials nor of the officials of the United States, the one in paying and the other in receiving the State's money, bind the State so as to place her in the attitude of a tax-payer and confine her to the tax-payer's remedy for relief—a remedy which shortens the statute of limitations to two years and places other obstacles to recovery not found in the general provisions of the law otherwise applicable.

Indeed, in this connection it may be remarked that, in sustaining the jurisdiction of the Court of Claims in the two Insular cases above cited, it was not necessary for the Supreme Court to change or modify any of its rulings in the Nichols case, for the reason that the suits brought in the Insular cases were not regarded by the court as customs cases—*i. e.*, revenue cases. The court having held that the claimants were neither exporters nor importers within the meaning of the revenue laws, and therefore not required to avail themselves of the remedies provided for cases arising under those laws, by that holding differentiated at once the cases before it from the Nichols case, which was clearly a revenue case. So, too, it must be similarly held that the case at bar is not a revenue case, since the State is not, and cannot be made, a tax-payer to the Federal Government.

The State not bound by the unauthorized Act of its agent.

That a State is not bound by the act of its agent in paying over its money to a third party when there is no law authorizing such payment has been well decided in the case of Wisconsin Central R. R. *vs.* United States, 164 U. S., 190, affirming the decision of this court in 27 Ct. Cl., 440. In that case it was said by Chief Justice Fuller, in delivering the opinion of the court:

"As a general rule, and on grounds of public policy, the Government cannot be bound by the actions of its officers who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made (Whiteside *vs.* U. S., 93 U. S., 247; Hawkins *vs.* U. S., 96 U. S., 689, and cases before cited). The question is not presented as between the Government and its officers, or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of this Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding. * * * Reference is made to Barnes *vs.* District of Columbia, 22 Ct. Cl., 366, 394, wherein it was ruled, Richardson, Ch. J., delivering the opinion, that 'the doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money when nobody but themselves suffer from their own ignorance, carelessness or indiscretion, because in the former case the elements of agency and the authority and duty of officers and their obligations to the public of which all persons dealing with them are bound to take notice are always involved.' We concur in these views and are of opinion that there is nothing in this record to take the case out of the scope of the principle that parties receiving money illegally paid by a public officer are liable *ex æquo et bono* to refund them."

Now, if a Government agent cannot bind the United States by his payment of money to a third party by mistake of law, can any sound reason be given why the same doctrine does not apply with equal force when the agent is an agent of one of the sovereign States of the Union, and the recipient is an agent of the United States, neither of whom has any authority of law from either of their principals to pay or receive this money.

Money paid under mistake of law may be recovered in this court even when a private party is the claimant, and, a fortiori, when a State, which can act only by its agents, is the claimant.

The money paid in the case at bar was paid under a mistake of law. A clear mistake of law is such a mistake as the Court of Claims, in the exercise of its *equitable* jurisdiction under the Tucker act, may correct.

In Snell *vs.* Insurance Company, 98 U. S., 85, 90, the Supreme Court, by Mr. Justice Harlan, delivering the opinion, quotes with approval the following language of Mr. Justice Story, in his Equity Jurisprudence, to show that equity will in a clear case relieve against even a mistake of law:

"We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief upon the mere ground of the misapprehension of a clear rule of law, *which has so long maintained its standing among the fundamental rules of equity jurisprudence*, is yet destined to afford the basis of many wise and just decrees without infringing upon the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

And in the same case the opinion of Chief Justice Marshall in Hunt *vs.* Rousmaniere's Adm'r, 8th Wheat., 174, was quoted, wherein he said that he had "found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity."

The case, then, is simply this: That the State officials, deeming the dispensers liable to be taxed as liquor dealers under the revenue law, have by an honest mistake as to the law conceived it to be the duty of the State to pay the tax, and have, therefore, without warrant of law, drawn from her treasury the money to pay it. It is not, however, a case in which the United States can say it is not concerned where the money came from to pay this tax if the dispensers were taxable. *The Government's agent demanded and received it with notice of its source.* It was paid to him by a warrant upon the State treasurer stating on its face the purpose for which it was paid. He was therefore charged with knowledge that there was no law authorizing that to be done. Were the money now in his hands it could undoubtedly be recovered, but he has been compelled by his principal to pay it into the treasury, and equitably we have the right to follow it there. The case would seem to be even much stronger than that of The United States *vs.* Bank, 96 U. S., 30, heretofore cited, where it will be remembered money was received by a Government agent with knowledge of the fact that it was money of a third party, and though he paid it into the Treasury (not by the command of his principal—the Secretary of the Treasury—as the revenue collector did in the case at bar, but to cover up his own shortage), it was held that in good conscience the Government was liable to refund it.

The Dispensary Law is constitutional and is a legitimate exercise by the State of its Police power.

Immediately upon the establishment of the dispensary system it was attacked right and left by its enemies as unconstitutional. Zealous but mistaken churchmen and a deeply interested saloon element joined hands, the holy with the unholy, to defeat it. It was argued that while the legislature might exercise its police power to prohibit *entirely*

the sale of liquor within the State, yet that was very different from prohibiting its sale by private parties and then permitting its sale by certain specified State officials; that the effect was not only to create a monopoly by the State in the liquor traffic, but also to create an unjust discrimination in favor of a class of citizens. But the supreme court of the State in State *ex rel.* George *vs.* Aiken, 42 South Carolina, 222, in a well-considered opinion, elaborately considering the law and reviewing the authorities, held—I quote from the syllabus:

"1. The State, under its police power, can itself assume entire control and management of those subjects, such as liquor, that are dangerous to the peace, good order, health, morals and welfare of the people, even when *trade* is one of the incidents of such entire control and management on the part of the State.

"2. The dispensary act of 1893 providing for the sale of liquor by the State alone, carefully regulating such sales, and excluding all other purchases and sales within the limits of the State, is a police measure, and a valid exercise of the legislative power even though there may be a possible revenue, and the restrictions imposed might as well have been thrown around the liquor traffic in the hands of private persons."

In Crowley *vs.* Christensen, 137 U. S., 90, it was also said:

"By the general concurrence of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors in small quantities, *to be drunk at the time* are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. * * * The police power of the State is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of a State, or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already

said, be entirely prohibited, or permitted under such conditions as will limit to the utmost its evils. *The manner and extent of regulation rests in the discretion of the governing authority.* * * * *It is a matter of legislative will only.*"

Subsequently the question of the constitutionality of the dispensary law came directly before the Supreme Court of the United States in Vance *vs.* Vandercook, 170 U. S., 438. It was attacked upon the same exploded theory that the State could not monopolize to itself the trade in liquor; but the Supreme Court held that the *manner of regulating the traffic* was solely for the legislature, and that the dispensary law violated no provisions of the Federal Constitution.

The ground upon which this Case was decided by the Court of Claims and the answer thereto.

In the opinion delivered by Chief Justice Nott, of the Court of Claims, when deciding this case, it is said:

"The court does not question the power of the State to carry on this business, and does not doubt that the proceeds of the business lessen the taxes of the tax-payers. *All that it* DECIDES is that the business of the dispensaries was intrinsically *business* and not *government;* and being business was subject to the same national tax which is borne by all *other persons* engaged in the same business" (Rec., 23).

It will be seen from the above that the court decides two distinct points:

1st. That the dispensary law is not the exercise by the State of its *police power*, but the carrying on of a business,

2d. That the State is a "person" within the meaning of the revenue law and is subject to pay the same national tax, which is borne by all "OTHER PERSONS" engaged in the same business.

Elsewhere in its opinion the following language is used:

"The National Government, in effect, says to the State, 'Exercise your police power as you will, but pay to the National Government *a tax which is authorized by the Constitution and imposed by the statute.*'"

The issue then is squarely made.

Counsel for the claimant says the State is not a "person" within the meaning of sections 3232 and 3244 of the Revised Statutes, which imposes a special tax upon "every *person* who sells or offers for sale," &c. On the other hand, the Court of Claims decides that the State is "a person" within the meaning of those words of the statute.

Counsel for the claimant says the dispensary law is an exercise by the State of its police power, and therefore its instrumentalities (the dispensers) for carrying that law into effect cannot be taxed by the "National [Federal] Government."

The Court of Claims denies this contention and decides that the tax is "authorized by the Constitution and imposed by the statute," and the State may exercise its police power "as it will," but must "pay the tax."

Elsewhere the court says, "The National Government does not interfere with the exercise of the police power [of the State]; but the National Government cannot be expected *to aid it*"—*i. e.*, not to tax it. In other words, the syllogism, curious as it may seem, amounts to this:

Not to tax the police power of the State is to aid it.

The Federal Government will not *aid* the police power of the State.

Therefore the Federal Government taxes it.

We have, then, the proposition of constitutional law as enunciated by the Court of Claims squarely presented in the following terms:

1. That the dispensary law of the State of South Carolina is not an exercise by the State of its police power, but the

attempt of the State to carry on a *business* or commercial enterprise.

2. That even if it be an exercise of its police power, it is, nevertheless, subject to taxation under the revenue laws of the United States, for, says the court, "exercise your police power as you will but pay to the national Government a tax which is authorized by the Constitution and imposed by the statute."

These conclusions of law thus avowed are combatted in this case. The findings of fact are of course admitted. The difficulty, however, is that the Court of Claims does not reach its conclusions of law from any of its twelve findings of fact as set forth in the record, beginning at page 9. Its conclusions of law are derived from and based on a series of declarations of *a supposed state of facts*, which are in no single instance supported by the record of facts as found by the court in its "finding of facts" set forth in the record, and which are the only *facts* which this court or the Court of Claims can look to whereon to base its conclusions of law. These *extra* judicial findings are contained in the following excerpt from the court's opinion (Rec. 19); the italics are those of the court, not mine:

'The commercial character of the State's undertaking is stamped unmistakably upon the system. The statute establishing it authorized a *profit* of 50 per cent.,* and con-

* It will be observed that the learned judge is referring to the dispensary act of 1892, which is not involved in this case, since owing to the statute of limitations the special taxes collected by the United States from the dispensers for the years 1893 and 1894 are barred by the statute of limitations. The act of 1892 was amended December 22, 1893, and as shown by the supreme court of South Carolina in the Aiken case, 42 So. Ca., 222, 230, the revenue feature of the act of 1892 was entirely changed and made dependent upon rules to be adopted by the board of control created by the

templated large profits, directing the manner in which they should be utilized and distributed. As a matter of fact, the system has been a great commercial success, and has yielded large profits. (NOTE.—Nothing of this "great commercial success" appears in the finding of facts.) In 1898, however, the system as a business was confronted by judicial interference in the form of an injunction which enjoined the State officers from interfering with the delivery and sale of liquor brought into the State from beyond its borders. The governor of South Carolina regarded the injunction as a blow possibly, if not probably, fatal to the system itself. In his annual message he brought the subject before the legislature, and said:

"'Judge Simonton has destroyed, along with the dispensary, the license system *when run for profit*. What, then, is left to do? We must either enact prohibition or continue the dispensary system *without the profit feature*. Many, a majority, I believe, do not think prohibition is practicable; and many have approved the dispensary system *because of the profit feature*. We can certainly get rid of the "original package" dealer and their demoralizing traffic by continuing the dispensary, *shorn of all profits and administered only as a police regulation to control and reduce the liquor evil*. The Federal judge will have neither occasion nor excuse for his ever-ready injunctions, *if that system shall be inaugurated*,

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act, and, said the court (p. 241), "It is within the power of the board of control to eliminate the profit feature altogether." So that the Court of Claims was really not construing the act under which we claim that the State was exercising its police power, but a *repealed statute!* The opinion of the Court speaks of an "authorized" profit of fifty per cent. This is misleading; the act referred to limits the profit at which the State Commissioner shall sell to *not more* than fifty per cent., but his action is subject to the approval of the Board of Control. The figures, $545,248.12, alluded to by the Court (Rec., 20), are taken from the VIII Finding of Fact. Only half of this went to the State, whose profit, as shown in said Finding, so far from being fifty per cent., was less than ten per cent. If it be that the Court of Claims may go outside of the Findings of Fact to cite from and base an argument on a message of the Governor of the State, then I ask leave to cite from another message of the Governor of the State, which shows conclusively the police character of the dispensary law and the manner of its enforcement by the State Executive (see Appendix No. 2, *post*).

unless he shall again reverse his own previous decision. This, then, appears to me to be the best and almost the only thing left for us to do. *We might try this policy for a year*, and next winter, after Congress shall have acted or failed to act, and after the Supreme Court at Washington shall have decided what is to become of the State's power to control liquor under the Wilson bill of 1890, we shall be in a position to take final action.'

"And in his annual message of the following year, he said:

"'The dispensaries have been forced to fight free whiskey on terms of absolute equality; yet, strange to say, they have fought it successfully; *for while the profits were reduced by this lawless competition, there was still enough business to make the dispensary self-supporting and leave a small margin of profit.*'

"The legislature apparently acquiesced in the suggestion of the executive in 1898 to 'try this policy for a year,' and allowed the system to continue; and it continued to do business and to make a profit upon its business, as shown by the above quotation from the message of 1899, notwithstanding that imported liquor was brought into the State and sold in the original packages. But before the year of probation expired the competition which the governor of South Carolina deplored was largely, if not altogether, removed by the decision of the Supreme Court in *Vance v. Vandercook* (170 U. S. R., 438), wherein it was held that the purchaser within a State has the constitutional right to receive packages sent from another State for his own use, notwithstanding that there be State laws to the contrary, but that he can not sell in the original packages in defiance of State law. There was thus restored to the State substantially its monopoly of the sale of intoxicating liquors, and the business yielded a net profit in the year 1901 of $545,248.12."

Nothing of this sort appears in any of the findings of fact, and this court cannot of course assume them to be correct.

United States *vs.* Clark, 96 U. S., 37.

Mohun *vs.* United States, 14 Wall., 109.

But even did we assume these statements of fact set forth in the court's opinion to be a part of the findings of fact,

they would constitute no justification for the conclusions of law reached by the Court of Claims, because the question whether or not a statute is an exercise by the State of its police power is to be tested by the terms of the statute itself and not by what the State officials declare in regard to it; and, moreover, as we shall see, the fact that the State derives a profit from the administration of its police law does not make it any the less a police law.

The conclusions of law reached by the Court of Claims can only be correct by assuming that for nearly a half century the chief law advisers of the United States Government have been advising it wrongly. Nay, more than this, I respectfully submit that to sustain the Court of Claims in its present ruling the Supreme Court of the United States must declare its own rulings upon the same question for nearly a century past unsound. And it would seem that something of this sort was in the minds of the learned judges of the Court of Claims in considering this case, for, says the opinion:

"The court has not overlooked the fact that in one instance a State was carrying on an ordinary commercial business, owning and operating a railroad, and that *one* court of the United States held that it was not intended that a State should be included in the requirements of this statute by the term 'corporation' (*State of Georgia v. Atkins*, collector, 35 Ga. R., 315), and that the decision has been referred to *in an indirect way* by one of the judges of the Supreme Court (*United States v. Railroad Company*, 17 Wall. R., 322, 328). But this court is constrained to say that *the magnitude of the present question was not presented to the court in Georgia and was not considered, and that the question involved there was not involved in the case in the Supreme Court*, where all that was held was that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues."

With all respect, I have yet to learn that the "magnitude" of a question can change the law. Furthermore, I respectfully submit, the question involved in the Georgia case was

precisely the same question in principle involved in the Balt. & Ohio case.

The so-called "Commercial" feature of the Dispensary Law.

I have already discussed in this brief the questions of law which have been put in issue by the decision of the Court of Claims, and of course will not go over the subject again. There are, however, a few propositions, not there dealt with, save merely by way of allusion, that may perhaps require notice, and the most important of them is the proposition made by the Court of Claims, that where a State carries on a commercial business for "profit" that business is liable to taxation by the Federal Government.

It is submitted that that question cannot arise in this case until it is first determined that the dispensary system of the State of South Carolina is a commercial enterprise on the part of the State, and not an exercise by it of its police power, but assuming for the moment that it is the former, it is by no means the law that when a State engages in an enterprise, which, if carried on by a private person, would be subject to taxation under the revenue laws of the Federal Government, the State itself is liable to the same taxation.

A sufficient answer to the proposition of the Court of Claims in this regard will be found in the decision in Georgia vs. Atkins just above cited. In that case it will be seen that the State of Georgia had purchased a railroad and was engaged in *running it* as a State enterprise, carrying passengers and freight *for hire* and profit. What was this but engaging in *business?* Yet when the internal-revenue officers attempted to tax the gross receipts of the railroad, under a general provision of the internal-revenue law extending to all railroads, it was held that the law had no application to the State railroad, and the tax was enjoined. This case was cited with approval in the Baltimore and Ohio R. R. case, and Mr.

Justice Bradley concurred in the judgment expressly upon the ground "that Congress did not intend by the internal-revenue laws to tax property belonging to States." In that case the city of Baltimore had entered upon the business enterprise of lending its money upon interest to the Baltimore and Ohio Railroad Company. What was that but engaging in the business of lending the State's money for profit, and a double profit at that—*i. e.*, the profit on the money loaned and the profit realized by securing the building of a railroad for the city of Baltimore? Yet the Supreme Court said the income so derived could not be taxed by the United States, because it was the property of a State. So, in the Detroit House of Correction case, 12 Op. Att'y Gen'l, 376, the State of Michigan had entered into the business of *manufacturing* and selling articles which if manufactured and sold by private parties would have been subject to taxation under the internal-revenue law. The same principle was applied in the case of "The Taxation of State Railroads and Manufacturers," 12 Op. Att'y Gen'l, 277, and the case of the Hartford National Bank, 12 *id.*, 402, and in cases reported in 13 *id.*, 67 and 439, all of which are cited and quoted from on page 6 of my principal brief. Five different Attorneys General of the United States have held in those cases—in all of which the various States concerned were engaged in some kind of *trade* or *manufacture*—that the internal-revenue law had no application to them, for two reasons:

1st. *That a State is not a person;* and

2d. *That neither a State nor its property can be taxed by the Federal Government.*

But a complete answer to the proposition, so far as it can arise in this case, is given by the supreme court of South Carolina in its opinion in the case of *Ex rel.* George *vs.* Aiken, 42 So. Ca., 222, where, when considering this very question,

i. e., whether the dispensary system was a commercial enterprise on the part of the State or a legitimate exercise by it of its police power, it answered the contention of counsel that section 41, article 1, of the State constitution forbade the State from engaging in and monopolizing the business of liquor selling. Said the court:

"If such was the object of the [dispensary] act and it was not intended as a police measure, it would be unconstitutional, even in the absence of sec. 41, art. 1. As we have said, *if the act is not a police measure, it is unconstitutional.* It is quite a different thing, however, *when trade is simply an incident to a police regulation.* Buying and selling on the part of the Federal, State, and municipal governments take place every day, and as long as the buying and selling are in pursuance of police regulations they are entirely free from legal objection. The Federal Government sells liquor and other articles that they have seized as contraband. Articles are purchased by the State to keep up the penitentiary and asylum and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the State, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs. The very distinction for which we contend is pointed out in the case of Maulden *v.* City Council, 33 S. C., 1. In that case the court showed that it was not wrong for the city to buy and sell for a public purpose, but that the act only became illegal when it was for *a private purpose.* We think the case was properly decided, and that the decision rested upon this distinction." (State *v.* Aiken, *supra*, 247.)

Salt Lake City vs. Hollister, 118 U. S., 256.

The Court of Claims in its opinion cites the above case and also the case of The Republic of Honduras *vs.* Soto, 112 N. Y. R., 110, with the remark that they "admonish us that such terms as 'person' and 'corporation' are broad enough in statutory construction to include the corporate title of a Government or municipality." In this the learned court

loses sight of the fact that neither the Republic of Honduras nor the Territory of Utah are *States* of the Federal Union. The Federal Constitution was not adopted with reference to the rights of any of the Republics of South America; and with respect to the Territory of Utah it need only be said that there is a great difference between that, or any other, Federal Territory and a State—the former is the creature of Congress; a State is not. Congress may enact any laws it pleases in respect of the taxation of the former. The Federal Constitution does not control it in that respect. The contrary is the case with a sovereign State of the Union. Salt Lake City, as a territorial municipality, was, at the time in question, wholly subject to the legislation of Congress. If Utah had then been a State of the Union, Salt Lake City would have had the same right of exemption from Federal taxation of her property as the city of Baltimore, in the State of Maryland. It will be remembered that in the Baltimore and Ohio Railroad case, *supra*, the Supreme Court held the latter city to be an aliquot part of the State, and therefore, as such, the income of bonds owned by it was exempt from taxation under the Federal internal-revenue laws. The court did not apply the same rule to Salt Lake City, for the plain reason that the latter was part of a Territory, and as such was not subject to the limitations of the Constitution upon questions of taxation.

"Triviality" (?) of the Tax Immaterial.

One or two other criticisms and I have done with this remarkable opinion. The court speaks of the tax (which amounts to about $3,000 a year and already exceeds $20,000 taken from the State's treasury) as being "*trivial*." Of course it is not the question of the *amount* of the tax, for with that neither the Court of Claims nor this court has anything to do. It is the *right* to tax at all which is the question before the court, for, as was said by Chief Justice

Marshall, the power to tax includes the power to destroy. If, therefore, the Federal Government can levy any tax at all against the dispensary system of South Carolina, whether directly or indirectly, it can tax that system out of existence, as it taxed the private State banks out of existence.

Loss of Revenue to the Government Immaterial.

So, too, the question whether the State could set up a distillery and distill its own liquors and dispose of them within and *without* the State free of taxation is a question not involved in this case, but, if it were, certainly the argument that if the Federal Government could not tax these liquors thus distilled by the State it would deprive that Government of a large revenue can have no place in any consideration of the *law* of the subject, any more than it had when this court was considering the validity of the income tax in Pollock *vs.* Trust Company, a decision which deprived the Government of an annual revenue exceeding, it has been estimated, fifty millions of dollars. Nor does the alleged fact that the tax is not really paid by the State but by the purchaser of the dispensary liquor seem to be at all relevant, since in the last analysis all taxes come out of the pocket of the citizen.

The Application for the Trade-Mark.

I would—merely by way of protest, however—call the attention of the court to the tenth finding of fact. This finding has no proper place in this case. It is entirely irrelevant. The application for a trade-mark was refused upon the express ground that the dispensary *was not engaged in, and could not, under the law of the State creating it, engage in the sale of liquor outside of the State.* Said the learned Commissioner (Seymour) in delivering his opinion in the case:

"The application for this trade-mark is made by the governor in the name of the State, and the State legislation

under which this action is taken is before me. Its significant title is 'An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this State, except as herein provided.'

"A critical analysis of the act shows it to be a stringent measure of State regulation, within the State, of a traffic considered open to abuse in private hands. The comprehensive language of the first section definitely restricts the traffic within the limits laid down in the act. The State commissioner purchases the liquors and furnishes them to the county dispensers, to be sold as the act prescribes: 'In all purchases or sales of intoxicating liquors made by said commissioner, as contemplated in this act, the commissioner shall cause a certificate to be attached to each and every package containing said liquors when the same is shipped to him from the place of purchase, or by him to the county dispensers, certified by his official signature and seal, which certificate shall state that the liquors contained in said package have been purchased by him for sale within the State of South Carolina, or to be shipped out of the State, under the laws of said State.' (Part of section 2.)

"The expression 'to be shipped out of the State' evidently refers to the traffic, elsewhere permitted in the act, to manufacturers located within the State, who may sell outside the State, provided the certificate of the State commissioner is obtained and affixed to every package.

"Section 18 appropriates the sum of fifty thousand dollars, if so much be necessary, for the purpose of purchasing and of supplying liquors to be distributed to county dispensers under the provisions of the act.

"Every one of its minute provisions may be given its full and appropriate meaning by construing the whole act as a measure for the suppression of the liquor traffic in South Carolina by private individuals, and to substitute therefor its complete control by the State through local public dispensers. It is only by strained constructions that any phrases in the act may be held to look to the establishment of an outside traffic of any kind, excepting in the purchase of the liquors to be dispensed. Nor is there anything in the general or special objects of the statute to show that the State intended to descend to the level of a trading corporation outside its own limits in and by the same public act whereby it prohibits both individuals and private corporations, and,

by necessary construction, other States themselves, if they should attempt to act as private corporations in this particular, from entering for the purpose of this traffic the domain of South Carolina. If it should be held that the State could enter the field of commerce in traffic in intoxicating liquors outside its own limits, it must at the same time be held that the State *has not done so* in or by the legislation before me.

"The State speaks by its constitution and public acts. Its law-making power, including within that term the power by which constitutions are made as well as laws, is *alone* the repository of the sovereign and governmental powers of the State. That power is *alone* competent to initiate and define the policy of the State. *Neither the governor nor the State board of control provided for in this act can by any acts of theirs, even in the name of the State, take the State into trade.*

"The provisions of the trade-mark law of 1881 are that owners of trade-marks used in commerce with foreign nations, or with Indian tribes, may obtain registration, but the application must be accompanied by a declaration to the effect that such party has at the time a right to the use of the trade-mark sought to be registered.

"It is considered that the State of South Carolina, notwithstanding the acts of its governor and State board of control, *has not authorized trade in liquors outside its own limits*, is not the owner of any trade-mark, has not at this time the right to the use of the trade-mark sought to be registered, and therefore the application is denied" (Pat. Off. Gaz., vol. 64, p. 1395).

The Opinion of the Supreme Court of South Carolina on the Dispensary Law as an Exercise of the State's Police Power.

As an answer—full and complete—to every proposition advanced by the Court of Claims in its opinion in this case, I desire to place before the court in the remaining pages of this brief the opinion of the supreme court of the State of South Carolina in the case of State *ex rel.* George *vs.* Aiken, 42 So. Ca., 222, or at least so much thereof as bears directly upon the questions before this court.

In that case the dispensary law of South Carolina was discussed in all its bearings and its constitutionality as an exercise by the State of its police power upheld by the court. The relator, George, who was operating a dispensary by State appointment and authority, under the act of the General Assembly, approved December 23, 1893, and known as the "Dispensary act," having been summoned to answer before the town council of Aiken for violation of an ordinance prohibiting the sale of vinous or malt liquors without a license, applied for a writ of prohibition, restraining the town council from interfering with him upon that charge on the ground that the ordinance was a nullity, and that the council, in seeking to enforce it, was attempting to exercise an unauthorized power. The respondent attempted to justify its proposed action by asserting the validity of the ordinance, and by the claim that the dispensary act was null and void as violative of the State constitution, and also as violative of the Constitution of the United States and of the laws regulating interstate commerce, but these latter grounds were not pressed on the argument in the Supreme Court. The court below held on the authority of McCullough *vs.* Brown, 41 S. C., 270, that the act of 1893 was violative of the State constitution and null and void, and ordered the writ of prohibition to issue, and it was this action of the court below which came under review by the supreme court of the State on appeal from the decision. As a matter of historical interest, it may be stated that the dispensary act of 1892 had been construed by Judge Simonton in the circuit court of the United States in the case of Cantini *vs.* Tillman, 54 Fed. Rep., 969, and the constitutionality of the act sustained as a valid exercise by the State of its police power. Subsequently, by an act of December 23, 1893, the Legislative Assembly amended the act in many particulars, and it was this latter act as amended which had been construed by the supreme court of the State in McCullough *vs.* Brown and held to be unconstitutional. So that when the Aiken case came before the court the impor-

tance of the question was heightened by the fact that the court was confronted by its former decision holding the act of 1893 to be violative of the State's constitution. In a most learned and well-considered opinion by Mr. Justice Gary, all the authorities were reviewed, and the conclusion arrived at that the decision in the McCullough case was wrong in principle, and it was accordingly overruled. I now reproduce here so much of the court's opinion as bears upon the question involved in the present case. The italics in the opinion are all my own. After showing that the dispensary act of 1892 did not in its title expressly purport to be a police measure, while such was the title of the act of 1893, and further that in the act of 1893 the revenue feature is dependent upon rules to be adopted by the State board of control, while in the act of 1892 express provision was made in the act itself as to the revenue, and declaring that, notwithstanding the amendment, the principles upon which the court in the former case had declared the act of 1892 unconstitutional would, if followed, make the amended act also unconstitutional, the court proceeded to reconsider the question of the constitutionality of the dispensary law with special reference to its so-called "profit" and "monopoly" features.. Said the court:

We think differences of opinion as to the constitutionality of this act arise from the attempt on the part of some to apply to it the law applicable to the ordinary commodities of life. The sale of an article may be lawful unless restrained by law, and yet it may be of such a nature as to endanger the peace, safety, health, and morals of a people. We do not suppose there is a more potent factor in keeping up the necessity for asylums, penitentiaries, and jails, and in producing pauperism and immorality throughout the entire country, than liquor, and yet it is argued that it is to be placed on the same footing with the breadstuffs and other ordinary commodities of life. Black Intox. Liq., § 31, says: "For an unregulated and unrestricted traffic in liquor, it is admitted, threatens the public safety by generating vice and crime, imperils the peace and order of the community

by the demoralization of its victims, and poisons the fountains of the public prosperity by its contributions of pauperism and squalor." The same author, in section 35, says: "Restraints upon the traffic in spirituous liquors are not like such as restrict the ordinary avocations of life which advance human happiness, or trade and commerce, that produce neither immorality, suffering, or want." Parker and Worthington, on Public Health and Safety, shows that the business of selling liquor is attended with danger to the community, and that a citizen has not the inherent right to follow such avocation.

We quote the following from State *v.* Turner, 18 S. C., 106, in which Mr. Justice McIver delivered the opinion of the court: "The power of the legislature to regulate the sale of spirituous liquors has been too long and too well settled to admit of question at this late day. Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and, therefore, it has long been settled that the law-making power may throw such restraints around that traffic, as in the judgment of that department of the government may be necessary to secure the peace and welfare of society."

The court, in Crowley *v.* Christensen, 137 U. S., 90, says: "It is urged that as the liquors are used as a beverage and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should be without restriction, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist—that when the liquors are taken in excess, the injuries are confined to the parties offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business, and waste of property, and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount

of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. * * * The *police power of the State is fully competent to regulate the business*, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attendant with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. *The manner and extent of regulation rest in the discretion of the governing authorities.* That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. *It is a matter of legislative will only.*"

It is because liquor is not regarded as one of the ordinary commodities that the act of 1892 prohibiting its sale, was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. *It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that if the Government can take the exclusive control of the liquor traffic, it can do so as to any other avocations in life.* In Black Intox. Liq., § 24, the police power is thus defined: "It cannot be doubted, however, that the origin of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest; for the State, whether we regard it as an association of individuals or as a moral organism, must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality. Theories of the State, according as they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitations of the police power. But its existence in a measure proportionate to the

rights and duties it is to guard, is implied in the recognition of the State as a factor in law and civilization. 'It is a power,' as has been well said, 'essential to self preservation, and exists necessarily in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity.' For these reasons, it appears that the nature and authority of the police power are best described by the maxim, '*Salus populi suprema lex*,' while the principle, '*Sic utere tuo ut alienum non lædas*,' furnishes in most cases a convenient rule for its application."

We find the following in Trageser *v.* Gray, 73 Md., 250: "We are unable to conclude that every one, citizen or alien, can acquire rights which can in any way control, impair, impede, limit, or diminish the police power of a State. Such power is original, inherent, and exclusive. *It has never been surrendered to the General Government, and never can be surrendered without imperiling the existence of civil society.*" Mr. Justice Field, in his dissenting opinion in Slaughter House cases, 16 Wall., 36, although he denied the application of the doctrine of police power to the cases then before the court, says: "If it really were a police regulation, it would undoubtedly be within the power of legislation." Chief Justice Waite, in Stone *v.* Mississippi, 101 U. S., 814, says: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental powers is continuing in its nature, and they are to be dealt with as the special exigencies of the Government may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. *For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.*"

The police power being fundamental in its nature, inherent in and so essential to Government, that its very existence is dependent thereon, the exercise of such power is necessarily one of the chief functions of Government, *and primarily devolves upon the Government itself*, although it has been allowed in certain cases to *delegate* and "farm out" such power to corporations and individuals. The licensed saloon-keeper does not sell liquor by reason of an inalienable right inherent in citizenship, but because the Government *has delegated to him* the exercise of such rights under its

power of police. *It would be an anomaly in the law to hold that the principal could delegate to an agent a greater power than the principal himself could exercise;* yet that is contended in this case. The question admits of graver doubts as to the right of the Government to delegate the power than to *exercise it directly.*

There are expressions of Mr. Justice McGowan in the case of Town Council *v.* Pressley, 33 S. C., 56, tending to sustain this view. That case also shows that *the court cannot question the discretion exercised by the law-making body in adopting such measures as, in its judgment, seemed best under its power of police.* In that case he says: "Undoubtedly, as a rule, every man may cultivate his own land in his own way, but even in that case he may use his land in such manner as to amount to 'a nuisance,' indictable at common law. That, however, does not touch the question under the ordinance passed by virtue of the powers conferred upon corporate authorities by the legislature 'for preserving the health, peace, order, and good government of the town.' The ordinance, by its declared purpose, was a police regulation for preserving the health of Summerville, a small town in the pines, about twenty miles out of Charleston, which afforded a convenient summer resort for health. Assuming, for the present, that the town council had the power to pass the ordinance, no question can be made whether 'a nuisance' had been created, nor whether the restrictions complained of were necessary to accomplish the purpose in view. *It was their exclusive right to judge what was necessary and requisite to preserve the health of the town.* 1 Dill. Mun. Corp., § 144, and authorities in note." Again: "The State, through the law-making body, certainly possesses the police power, which, from its very nature, has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Judge Dillon describes it thus: 'Every citizen holds his property subject to the proper exercise of this [police] power, either by the State legislature directly, or by public corporations to which the legislature may delegate it.'" Again: "If the legislature itself had passed the Summerville ordinance just as it stands, it could not, as we think, be doubted that it was a constitutional exercise of the police power. It is said, however, that it was a mistake to suppose that the cultivation of the soil in certain crops was dangerous to health, and, therefore, the restriction was not a proper

one. We suppose that the cultivation inhibited must have been considered as dangerous to health in the locality of Summerville. But, be that as it may, it was a question for the law-making body. 'The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. *It cannot run a race of opinion upon points of right, reason, and expediency with the law-making power.*' Cooley Const. Lim., p. 201. Assuming that the legislature had the power to pass the Summerville ordinance, there can be no doubt that it had the right to delegate that power to the municipal authorities of Summerville, as the governmental agent of the State within the corporate limits of the town. 'The preservation of the public health and safety is often made a matter of municipal duty, and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress particular branches of business, if deemed necessary for the public good.' See 1 Dill. Mun. Corp. (3d ed.), § 144, and Harrison *v.* Mayor &c. of Baltimore, 1 Gill., 264.'

It will be seen from that case that the power of police is so great that under its exercise a person may be restricted as to the area of land he shall be allowed to cultivate under certain circumstances; yet it is contended that the State cannot take control and management herself of the liquor traffic. In Mugler *v.* Kansas, 123 U. S., 660, the court says: "But by whom or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. *Under our system, that power is lodged with the legislative branch of the Government. It belongs to that department to exert what is known as the 'police powers' of the State, and to determine primarily what measures are appropriate or needful for the protection of public morals, the public health, or the public safety.* If, therefore, a State deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without

usurping legislative functions, overrule the will of the people as thus expressed by their chosen representatives. *They have nothing to do with the mere policy of legislation.*"

In the case of State *v.* County of Wapelo, 13 Iowa, 419, the court says: "Will it be said that the State can confer a police power which she herself does not possess? We do not believe that such is the theory or nature of the legislative department of our State government. We know that she may confer powers upon the judicial and executive departments, and authorize them to do acts which she herself could not do, for the reason that these are distinct and co-ordinate branches of the Government, the functions of which cannot be performed by the General Assembly, but which, nevertheless, are to a certain extent under legislative control and regulation. When we say, therefore, that the legislature cannot bestow upon her subdivisions rights and powers reserved by the Constitution from her, we mean, of course, a police power. These subdivisions receive their corporate existence and all their corporate duties and powers from the legislature. They are intended as instruments of government in the hands of the legislature to aid it in the administration of its public regulations within certain prescribed localities. *This being the case, it is competent for the legislature at any time to suspend these agencies and* RECLAIM *the powers which she had thus conferred,* AND EXECUTE THEM DIRECTLY HERSELF." Cooley Const. Lim., p. 119, says: "The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do, and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising such authority. Indeed, the whole authority might be revoked, *and the legislature resume the burden of the business to itself, if, in its wisdom, it should determine that the common welfare required it.*"

We come now to an examination of the act of 1893 [the dispensary law] as to its main features. It has been shown in the case of Mugler *v.* Kansas, 123 U. S., 623, that what are known as "police powers" of the government are to be determined primarily by the legislative department. *The intention of the legislature is to be gathered from the words of the act.* The title of the act is, "An act to declare the law in reference to and further regulate the use, sale, consumption, transportation, and disposition of alcoholic liquids or liquors within the State of South Carolina, and to police the same."

The act provides that "all such liquors, except when bought from a State officer authorized to sell the same or in possession of one, are declared to be contraband, and against the morals, good health, and safety of the State, and may be seized whenever found," etc. The governor, attorney general, and comptroller general shall *ex officio* constitute a State board of control to carry out the provisions of this act. The act provides for the appointment of a commissioner, who shall purchase all liquors for lawful sale under such rules and regulations as may be made by the State board of control, and furnish the same to such persons as may be designated as dispensers thereof. All liquors shall be tested by the chemist, and declared to be pure, before sale to the county dispensers. The State board of control shall appoint a county board of control, composed of three persons, who shall appoint certain officers known as "county dispensers." The dispensers can only sell by the package, which cannot be broken nor the liquor drunk on the premises where sold.

The act shows that the legislature had in view the protection of the "morals, good health, and safety of the State" in dealing with this question. Many safeguards are thrown around the sale of the liquor. The commissioner is to be an abstainer from intoxicants. The liquor is to be tested by the chemist and declared to be pure. The liquor is to be sold only by the package, which cannot be opened nor drunk where sold. The sales can only be made in daytime. Persons cannot be appointed on the county board of control who are addicted to the use of intoxicating liquors. No person can be appointed a county dispenser who has ever been adjudged guilty of violating the law relating to intoxicating liquors, nor who is keeper of a restaurant or a place of public amusement, nor who is addicted to the use of intoxicating liquors as a beverage. The county dispenser shall execute a bond in the sum of $3,000, upon which suit for damages may be brought for a violation of the provisions of the act by a wife, child, parent, guardian, employer, or other person. A majority of the voters in a township may prevent the establishment of a dispensary. The county dispenser shall take an oath therein prescribed. A printed or written request must be presented for permission to purchase. The sale shall not be made to a minor, a person intoxicated, a person in the habit of drinking to excess, nor to a person unless

known to the dispenser. It prevents the establishment of club-rooms where liquors are used. One of the beneficial results of the law is brought about by selling only for cash.*

It has been argued that there is no necessity for this regulation by the State; that the same results could be accomplished by allowing private individuals to carry on the traffic, and for this reason the act is null and void. The *necessity* was a question *exclusively* for the legislative department, as shown by the foregoing authorities, particularly Town Council *v.* Pressley, 33 S. C., 56. The judiciary "cannot run a race of opinions upon points of right, reason, and expediency with the law-making powers." The State has the right, through its own officers—in fact, it is its primary duty—to enforce its police regulations, which right inheres in government itself, and is paramount to any right inherent in citizenship. But, referring to the foregoing objection, as matter of fact, it would not be as efficiently enforced by private individuals, *because there would be the constant temptation to make as large profits as possible.* Chief Justice McIver, in McCullough *v.* Brown (p. 241), says: "By its profit feature it holds out an inducement to every tax-payer to encourage as large sales as possible, and thereby lessen the burden of taxation to the extent of the profits realized." Now, if the indirect profits in the case mentioned are sufficient to induce the tax-payer to encourage large sales in which he would at most have only a very small interest, how great would then be the inducement to encourage large sales when the seller would get all the profits? *The dispensary act itself is an outgrowth of a dissatisfaction on the part of the people with the manner in which the police power, when* DELEGATED, *was abused.* The law was enacted in self-defense, and vindicates the wisdom of our forefathers in allowing wide legislative discretion in the exercise of the police power.

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*These regulations as to sales of liquors and the conduct of the dispensary and its officials are a complete answer to the charge that profit and commercial enterprise are the *primal* objects of the dispensary law. If that were so—if profit and not *regulation* were the object of the law—the doors would be thrown wide open instead of restrictions being placed upon sales. Undoubtedly, but for these regulations *more* sales and more *profits* could be made.—F. H. M.

There is nothing in the act showing that its PRIMARY *object is the raising of revenue.* The sales are to be made under rules adopted by the county board of control, and approved by the State board of control. It is certainly possible for the objects of the act to be carried into effect under proper rules adopted for that purpose. *It is within the power of the boards of control to eliminate the profit feature altogether.* It is presumed that public officials will discharge the duties of office in a lawful manner until the contrary appears. When a case is brought before this court contesting the legality of the rules adopted by the boards of control, it will be time enough then for this court to pass upon the revenue feature. Suffice it to say, no such question is now before us.

* * * * * * *

Objection is made as to the constitutionality of the act on the ground that it creates a monopoly. Those interposing this objection likewise assume that it is not a police measure. The objection is fully met by the decision of the court in the Slaughter House cases, *supra*, in which the court says: "That wherever the legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired lawful purpose, seems hardly to admit of debate." Tied. Lim., 318, says: "If it is lawful for the State to prohibit a particular business altogether, or to make a Government monopoly of it, the pursuit of such business would, if permitted to any one, be a privilege or franchise, and, being like any other franchise, may be made exclusive. This is but a logical consequence of the admission that the State has the power to prohibit the trade altogether. Such an admission is fatal to a resistance of the power to make it a monopoly." *The doctrine of "monopoly" cannot be applied to a State in exercising its governmental functions.*

* * * * * * *

The next objection interposed by respondent is that the act is in violation of section 41, art. I, of the constitution of this State. That section is as follows: "The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people."

* * * * * * *

It is contended that the foregoing section prevents the legislature from embarking the State in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of sec. 41, art. I. As we have said, if the act is not a police measure, it is unconstitutional. *It is quite a different thing, however, when trade is simply an* INCIDENT *to a police regulation. Buying and selling on the part of the Federal, State, and municipal governments take place every day, and as long as the buying and selling are in pursuance of police regulations they are entirely free from legal objection. The Federal Government sells liquor and other articles that they have seized as contraband. Articles are purchased by the State to keep up the penitentiary and asylum and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the State, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs. The very distinction for which we contend is pointed out in the case of Mauldin v. City Council,* 33 *S. C.*, 1. *In that case the court showed that it was not wrong for the city to buy and sell for a public purpose, but that the act only became illegal when it was for a private purpose. We think the case was properly decided, and that the decision rested upon this distinction.*

The case of Beebe *v.* State, 6 Ind., 501, was upon the construction of a statute of Indiana somewhat similar to the act in question, and is relied upon as an authority to sustain the proposition that the State cannot take direct control and management of the liquor traffic. In that case the court uses the following language: "The business [the manufacture and sale of liquor] was, at and before the organization of the Government, and is properly at all times, a private pursuit of the people, as much so as the manufacture and sale of *brooms, tobacco, clothes,* and the dealing in *tea, coffee* and *rice,* and the raising of *potatoes*" (italics ours).

This case is in conflict with the distinction made between liquor and the ordinary commodities of life as enunciated in the case of Crowley *v.* Christensen, *supra;* Black Intox. Liq., *supra;* State *v.* Turner, 18 S. C., 106; and other authorities hereinbefore mentioned. If liquor is to be placed on the same footing with the articles mentioned in the Indiana case, then that decision was right; but if there is that

distinction for which we contend, then the case is valueless as an authority, being decided on erroneous principles. The principles upon which that case was decided would have forced the court that rendered it to have declared null and void a statute entirely prohibiting the traffic in liquor, although there is no longer any doubt as to the constitutionality of such statutes.

The case of Rippe *v.* Becker (Minn.), 57 N. W., 331, is also relied upon to sustain the constitutional objection to the act of 1893. The title of the act construed in Rippe *v.* Becker was "An act to provide for the purchase of a site, and for the erection of a State elevator or warehouse at Duluth for public storage of grain." The syllabus of the case prepared by the court states: "The police power of the State to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it." The language of the court, as applying to that case, was proper, and we think the case was properly decided *in the light of the distinction between liquor and the ordinary commodities of life* which we have pointed out. There was nothing in the business dangerous to the health, morals, and safety of the people, and the act should have been declared null and void.

Respectfully submitted.

FRANKLIN H. MACKEY,
Attorney for Appellant.

APPENDICES.

APPENDIX No. 1.

The Dispensary Law of South Carolina.

PROVISION OF THE CONSTITUTION 1895.

ART. VIII., SEC. 2. In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, *and may authorize and empower the State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations as it deems expedient: Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same.

The Dispensary Act of 1893.

[So. Ca. Stats., vol. XXI, p. 430.]

AN ACT TO DECLARE THE LAW IN REFERENCE TO, AND FURTHER REGULATE THE USE, SALE, CONSUMPTION, TRANSPORTATION AND DISPOSITION OF, ALCOHOLIC LIQUIDS OR LIQUORS WITHIN THE STATE OF SOUTH CAROLINA, AND TO POLICE THE SAME.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sit-

ting in General Assembly, and by the authority of the same, That the manufacture, sale, barter or exchange, receipt, acceptance, delivery, storing and keeping in possession, within this State, of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer) or other liquors, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, by any person, firm or corporation; the transportation, removal, the taking from the depot or other place by consignee or other person, or the payment of freight or express or other charges by any person, firm, association or corporation upon any spirituous, malt, vinous, fermented, brewed (whether lager, rice or other beer) or other liquor or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, except as is hereinafter provided, is hereby prohibited under a penalty of thirty days' imprisonment or one hundred dollars' fine for each offense. All such liquors, except when bought from a State officer authorized to sell the same or in possession of one, are declared to be contraband and against the morals, good health and safety of the State, and may be seized wherever found, without warrant, and turned over to the State Commissioner.

SEC. 2. The Governor, the Attorney-General and the Comptroller-General shall, *ex officio*, constitute a State Board of Control to carry out the provisions of this Act.

SEC. 3. That the Governor shall, at the expiration of the term of the present Commissioner, and at the expiration of every two years thereafter, appoint a Commissioner, which appointment shall be submitted to the Senate at its next session for its approval; said Commissioner shall be believed by the Governor to be an abstainer from intoxicants, and shall, under such rules and regulations as may be made by the State Board of Control, purchase all intoxicating liquors for lawful sale in this State, and furnish the same to such persons as may be designated as Dispensers thereof, to be sold as hereafter prescribed in this Act. Said Commissioner shall reside, and have his place of business, in the city of Columbia, in this State, and hold his office two years from appointment and until another be appointed in his stead. He shall be subject to removal for cause by the State Board of Control. He shall qualify and be commissioned the same as other State officers, and receive an annual salary of

$3,000, payable at the same time and in the same manner as is provided for the payment of the salaries of State officers. He shall be allowed a bookkeeper, who shall be paid in the same manner a salary of $1,200, and such other assistants as in the opinion of the Board of Control may be deemed necessary. He shall not sell to the County Dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina College and declared to be pure: *Provided*, That said State Board of Control shall have authority to appoint such assistants as they may find necessary to assist the chemist of the South Carolina College in making the analyses required by this Act, and the said State Board of Control may fix such reasonable compensation, if any, as they may deem proper for the services rendered by such chemist or such assistants. The State Commissioner shall deposit all amounts received by him from sales to County Dispensers or others with the Treasurer of the State under such rules as may be made by the State Board of Control to insure the faithful return of the same, and the State Treasurer shall keep a separate account with said fund, from which the Commissioner shall draw from time to time, upon warrants duly approved by the Chairman of said Board, the amounts necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said Commissioner in the purchase of intoxicating liquors, or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State Board of Control. He shall, before entering upon the duties of his office, execute a bond to the State Treasurer, with sufficient sureties, to be approved by the Attorney-General, in the penal sum of ten thousand dollars, ($10,000) for the faithful performance of the duties of his office. In all purchases or sales of intoxicating liquors made by said Commissioner as contemplated in this Act, the Commissioner shall cause a certificate to be attached to each and every package containing said liquors when the same is shipped to him from the place of purchase, or by him to the County Dispensers, certified by his official signature and seal, which certificate shall state that liquors contained in said package have been purchased by him for sale within the State of South Carolina, or to be shipped out of the State under the laws of said State; and without such certificate any package containing liquors

which shall be shipped out of the State, or shipped from place to place within the State, or delivered to the consignee by any railroad, express company or other common carrier or be found in the possession of any common carrier, shall be regarded as contraband and may be seized, without warrant, for confiscation, and such common carrier shall be liable to a penalty of five hundred dollars for each offense, to be recovered against said common carrier in any Court of competent jurisdiction by summons and complaint, proceedings to be instituted by the Solicitor of any circuit, with whom evidence may be lodged by any officer or citizen having knowledge or information of the violation; and any person attaching or using such certificate without the authority of the Commissioner, or any counterfeit certificate, for the purpose of securing the transportation of any intoxicating liquors out of or within this State in violation of law, shall upon conviction thereof be punished by a fine of not less than five hundred dollars and imprisonment in the Penitentiary for not less than one year for each offense.

SEC. 4. Said Commissioner shall make a printed quarterly statement, under oath, of all liquors sold by him, enumerating the different kinds and quantity of each kind, the price paid and the terms of payment, and to whom sold; also the names of the parties from whom the liquor was purchased, and their place of business and date of purchase, which statement shall be filed with the State Board of Control.

SEC. 5. The State Commissioner shall before shipping any liquors to Dispensers, except lager beer, cause the same to be put into packages of not less than one-half pint nor more than five gallons, and securely seal the same, and it shall be unlawful for the Dispenser to break any such package or open the same for any reason whatever. He shall sell by the package only, and no person shall open the same on premises: *Provided*, This Section shall not apply to malt liquors shipped in cases, or bottles thereof shipped in barrels, and such malt liquors may be sold by the County Dispenser in such quantities of not less than one pint as he may see proper: *Provided*, The same shall not be drunk on the premises. Dispensers shall open their places of business and sell only in the day time, under such rules as may be made by the State Board of Control.

SEC. 6. It shall be the duty of the State Board of Control to appoint a County Board of Control, composed of three per-

sons believed by said Board not to be addicted to the use of intoxicating liquors, who shall hold their office for a term of two years, and until their successors are appointed. Said County Board of Control shall be subject to removal for cause by the State Board of Control. Said County Board shall make such rules as will be conducive to the best management of the sale of intoxicating liquors in their respective Counties: *Provided*, All such rules shall be submitted to the State Board and approved by them before adoption. Said County Board of Control shall qualify and be commissioned as are other County officers, without fees therefor.

SEC. 7. Applications for position of County Dispenser shall be by petition, signed and sworn to by the applicant and filed with the County Board of Control at least ten days before the meeting at which the application is to be considered, which petition shall state the applicant's name, place of residence, in what business engaged, and in what business he has been engaged two years previous to filing petition; that he is a citizen of the United States and of South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a keeper of a restaurant or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage. This permit or renewal thereof shall issue only on condition that the applicant shall execute to the County Treasurer a bond in the penal sum of three thousand dollars, with good and sufficient sureties, conditioned that he will well and truly obey the laws of the State of South Carolina, now or hereafter in force, in relation to the sale of intoxicating liquors; that he will pay all fines, penalties, damages and costs that may be assessed or recorded against him for violation of such laws during the term for which said permit or renewal is granted, and will not sell intoxicating liquors under his permit at a price other than that fixed by State Board of Control. Said bond shall be for the use of the County or any person or persons who may be damaged or injured by reason of any violation on the part of the obligor of the law relating to intoxicating liquors purchased or sold during the term for which said permit or the renewal thereof is granted. The said bond shall be deposited with the County Treasurer, and suit thereon shall be brought at any time by the Solicitor or any person for whose benefit the same is given; and in case the conditions thereof,

or any of them, shall be violated, the principal and sureties thereon shall also be jointly and severally liable for all civil damages, costs and judgments that may be obtained against the principal in any civil action brought by wife, child, parent, guardian, employer or other person, under the provision of the law. All other moneys collected for breaches of such bond shall go into the County treasury. Said bond shall be approved by the County Board of Control under the rules and laws applicable to the approval of official bonds.

SEC. 8. There may be one or more County Dispensers appointed for each County, the place of business of each of whom shall be designated by the County Board, but the State Board must give consent before more that one Dispenser can be appointed in any County; and when the County Board designates a locality for a Dispensary, ten days' public notice of which shall be given, it shall be competent for a majority of the voters of the township in which such Dispensary is to be located to prevent its location in such township by signing petitions addressed to the County Board requesting that no Dispensary be established in that township, whereupon some other place may be designated. The County Board may in its discretion locate a Dispensary elsewhere than in an incorporated town in the Counties of Beaufort and Horry and no other: *Provided, however,* That any County, town or city wherein the sale of alcoholic liquors was prohibited by law prior to July 1st, 1893, may secure the establishment of a Dispensary within its borders in the following manner: Upon petition signed by one-fourth of the qualified voters of such County, town or city wishing a Dispensary therein being filed with the County Commissioners or Town or City Council, respectively, they shall order an election submitting the question of Dispensary or no Dispensary to the qualified voters of such County, town or city, and shall prescribe the rules, regulations, returns, ballots and notice of such election, and shall declare the result; and if a majority of the ballots cast be found and declared to be for a Dispensary, then a Dispensary shall be established in said County, town or city: *Provided,* That Dispensaries may be established in the Counties of Williamsburg and Marion without such election on compliance with the other requirements of this Act: *Provided,* That nothing in this Act con-

tained shall be so construed as to prohibit persons resident in Counties which shall elect to have no Dispensary from procuring liquors from Dispensaries in other Counties, or County Dispensers from shipping same to their places of residence under proper labels or certificates.

SEC. 9. If the application for the position of Dispenser be granted, it shall not issue until the applicant shall make and subscribe an oath, before some officer authorized by law to administer oaths, which shall be endorsed upon the bond, to the effect and tenor the following: "I,—— ——, do solemnly swear (or affirm) that I will well and truly perform all and sigular the conditions of the within bond, and keep and perform the trusts confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than is provided by law, and especially I will not sell or furnish intoxicating liquors to any minor, intoxicated person or persons who are in the habit of becoming intoxicated, and I will make true, full and accurate returns to the County Board of Control the first Monday of each month of all certificates and requests made to or received by me, as required by law, during the preceding month; and such returns shall show every sale and delivery of such liquors made by or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the liquors sold or delivered to any and every person as returned." Upon taking said oath and filing bond as hereinbefore provided, the County Board of Control shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this Act provided, and every permit so granted shall specify the building, giving street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time in which the same shall be in force, which in no case shall exceed twelve months. Permits granted under this Act shall be deemed trusts reposed in the recipients thereof, not as a matter of right, but of confidence, and may be revoked upon sufficient showing by order of the County Board of Control; and upon the removal of any County Dispenser, or upon demand of the County Board of Control, he shall immediately turn over to the County Board of Control all liquors and other property in his possession belonging to the State or County. Said County Board of Control shall be

charged with the duty of prosecuting the County Dispenser, or any of his employees, who may violate any of the provisions of this Act. On the death, resignation or removal of a County Dispenser, or expiration of his term of office, the County Board shall appoint his successor.

SEC. 10. The County Board of Control shall use as their office the office of the County Commissioners of their respective Counties, and the clerk of the Board of County Commissioners shall serve as their clerk. They shall preserve, as part of the records and files of their office, all petitions, bonds and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the County like other public records. The County Board of Control shall designate or provide a suitable place in which to sell the liquors. The members of the County Board of Control shall meet once a month, or oftener, on the call of the Chairman, and for their services they shall each receive a per diem of two dollars, and five cents mileage each way, and their clerk shall receive two dollars per day for the days actually employed as such, but they shall not receive compensation for more than thirty days in any one year. They shall, upon the approval of the State Board of Control, employ such assistants for the County Dispenser as may be necessary. The Dispenser and his assistants shall receive such compensation as the State Board of Control may determine. All profits, after paying all expenses of the County Dispensary, shall be paid one-half to the County treasury and one-half to the municipal corporation in which it may be located, such settlements to be made quarterly: *Provided*, That if the authorities of any town or city, in the judgment of the State Board of Control, do not enforce this law, the State Board may withhold the part going to the said town or city and use it to pay State Constables.

SEC. 11. Before selling or delivering any intoxicating liquors to any person, a request must be presented to the County Dispenser, printed or written in ink, dated of the true date, stating that he or she is of age, and the residence of the signer for whom or whose use the liquor is required, the quantity and kind requested, and his or her true name; and the request shall be signed by the applicant in his own true name and signature, attested by the County Dispenser

or his clerk who receives and files the request. But the request shall be refused if the County Dispenser filling it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess; or if the applicant is not so personally known to said County Dispenser, before filling said order or delivering said liquor he shall require the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to an excess.

SEC. 12. Requests for the purchase of liquor shall be made upon blanks furnished by the County Auditor, in packages of one hundred each, to the County Dispensers, from time to time as the same shall be needed, and shall be numbered consecutively by the Auditor. The blanks aforesaid shall be furnished to the County Auditor by the State Board of Control, in uniform books like bank checks, and the date of delivery shall be endorsed by the County Auditor on each book, and receipt taken therefor and preserved in his office. The Dispenser shall preserve the application in the original form and book, except the filling of the blanks therein, until returned to the County Auditor. When return thereof is made the County Auditor shall endorse thereon the date of return, and file and preserve the same to be used in the quarterly settlements between such Dispenser and the County Treasurer. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such County Dispenser.

SEC. 13. On or before the tenth day of each month each Dispenser shall make full returns to the County Auditor of all requests filled by him and his clerks during the preceding month, upon blanks to be furnished by the State Board of Control for that purpose, and accompany the same with an oath, duly taken and subscribed before the County Auditor or a Notary Public, which shall be in the following form, to wit: "I, —— ——, being duly sworn, state on oath that the requests for liquors herewith returned are all that were received and filled at my place of business under my permit during the month of ——, 189–; that I have carefully preserved the same, and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the

quantity and kind of liquors required, and that no liquors have been sold or dispensed under my permit during said month except as shown by the requests herewith returned; and that I have faithfully observed and complied with the provisions of my bond and oath taken by me, thereon endorsed, and with all the laws relating to my duties in the premises."

SEC. 14. Upon failure of any Dispenser to make the returns to the Auditor as herein required, it shall be the duty of said Auditor to report such failure to the State Board of Control, and the said State Board of Control shall immediately order the County Board to summon said delinquent Dispenser to appear before them and show cause why his permit should not be revoked; and if the cause shall not be shown to the satisfaction of the County Board of Control, they shall immediately annul said permit and give public notice thereof; and the Circuit Solicitor shall proceed to enforce the penalties prescribed in this Act for such violation against said County Dispenser at the next succeeding term of Court in the County in which such permit is held; and any Dispenser who shall sell or dispense any intoxicating liquors after his permit shall have been revoked shall, upon conviction thereof, be fined not less than five hundred ($500) dollars and be imprisoned for six months. If any Dispenser or his clerk shall purchase any intoxicating liquors from any other person except the State Commissioner, or if he or they, or any person or persons in his or their employ, or by his or their direction, shall sell or offer for sale any liquors other than such as have been purchased from the State Commissioner, or shall adulterate or cause to be adulterated any intoxicating, spirituous or malt liquors which he or they may keep for sale under this Act, by mixing with same coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kind or quality, or with water, or shall sell or expose for sale such liquors so adulterated, knowing it to be such, or shall change the label upon any box, bottle or package, he or they shall be guilty of a misdemeanor and be fined in a sum of not less than two hundred dollars or imprisonment for not less than six months.

SEC. 15. No person, firm, association or corporation shall manufacture for sale, sell or keep for sale, exchange, barter, or dispense, any liquors containing alcohol, for any purpose

whatever, otherwise than as provided in this Act. Dispensers as herein provided shall alone be authorized to sell and dispense such liquors, and all permits must be procured as herein provided from the County Board of Control: *Provided*, That the manufacturers of distilled, malt or vinous liquors who are doing business in the State shall be allowed to sell to no person in this State except the State Commissioner and to parties outside the State, and the State Commissioner shall purchase his supplies from brewers and distillers in this State where their product reaches the standard required by this Act: *Provided*, Such supplies can be purchased as cheaply there as elsewhere. Every package, barrel or bottle of such liquors shipped beyond the limits of this State shall have thereon the certificate of the State Commissioner allowing same, otherwise it shall be liable to confiscation, and the railroad carrying it shall he punished as in Section three: *And provided*, That any person shall have the right to make wine for his or her own use from grapes or other fruits.

SEC. 16. Every Dispenser shall keep a strict account of all liquors received by him from the State Commissioner, in a book kept for that purpose, which shall be subject at all times to the inspection of the Circuit Solicitor, any peace officer or grand juror of the County, or of any citizen, and such book shall show the amount and kind of liquors procured, the date of receipt and amount sold, and the amount on hand of each kind for each month. Such book shall be produced by the party keeping the same, to be used as evidence on trial of any prosecution against him, on notice duly served that the same will be required as evidence.

SEC. 17. The payment of the United States special tax as a liquor seller, or notice of any kind in any place of resort, or in any store or shop, indicating that alcoholic liquors are there sold, kept or given away, shall be held to be *prima facie* evidence that the person or persons paying said tax and the parties displaying such notices are acting in violation of this Act, and unless said person or parties are selling under permit as prescribed by this Act they shall be punished by a fine not exceeding one hundred ($100) dollars or imprisonment not more than thirty days.

SEC. 18. Licensed druggists conducting drug stores and manufacturers of proprietary medicines are hereby authorized to purchase of Dispensers of the Counties of their residence intoxicating liquors (not including malt) for the pur-

pose of compounding medicines, tinctures and extracts that cannot be used as a beverage. The Dispensers shall not charge such licensed druggists more than ten per cent. net profit for liquors so sold. Such purchaser shall keep a record of the uses to which the same are devoted, giving the kind and quantity so used, and quarterly they shall make and file with the County Auditor and with the County Board of Control sworn reports, giving a full and true statement of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the name of the Dispenser from whom the same was purchased, and the dates and quantities so purchased, together with an invoice of each kind still in stock and kept for such compoundings. If said licensed druggist shall sell, barter, give away or exchange or in any manner dispose of said liquors for any purpose other than authorized by this Section, he shall upon conviction forfeit his license and be liable to all penalties, prosecutions and proceedings at law and in equity provided against persons selling without permit, and upon such conviction the Clerk of the Court shall, within ten days after such judgment or order, transmit to the Board of Pharmaceutical Examiners the certified record thereof, upon receipt of which the said Board shall strike the name of the said druggist from the list of pharmacists and revoke his certificate: *Provided*, That nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage which is intoxicating in its character: *And provided, further*, That the State Commissioner shall be authorized to sell to manufacturing chemists and wholesale druggists alcohol by the barrel at cost.

SEC. 19. If any person shall make any false or fictitious signature, or sign any name other than his or her own, to any paper required to be signed by this Act, without being authorized so to do, or make any false statement in any paper, request or application signed to procure liquors under this Act, the person so offending shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not more than twenty-five dollars or be imprisoned not more than thirty days.

SEC. 20. If any Dispenser, or his clerk, shall make false oath touching any matter required to be sworn to under the provisions of this Act, the person so offending shall, upon

conviction, be punished as provided by law for perjury. If any County Dispenser shall purchase or procure any intoxicating liquors from other person than the State Commissioner, or make any false returns to the County Auditor, or use any request for liquors for more than one sale, in any such case he shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of five hundred dollars or six months' imprisonment.

SEC. 21. Every person who shall directly or indirectly keep or maintain, by himself, or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining, any club room or other place in which any intoxicating liquors are received or kept for use, barter or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every person who shall receive, barter, sell, assist, or abet another in receiving, bartering or selling, any alcoholic liquors so received or kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars or 30 days' imprisonment: *Provided*, That the State Board of Control shall have the power, upon a proper showing and under such rules as they may adopt, to exempt hotels where tourists or health-seekers resort from being considered nuisances or as violating this Act by reason of any managers of such hotels dispensing liquors bought from the Dispensary, by the bottle, either night or day, among the *bona fide* guests of such hotel; but before any such exemption shall be granted the State Board of Control shall require the manager of such hotel to give a good and sufficient bond, in the penal sum of three thousand dollars, conditioned for the observance of all the rules, regulations and restrictions prescribed and imposed by the said Board and with all the requirements of this Act; and it shall be lawful for any Constable or officer thus empowered under this Act to enter such hotel and search it, at any time, day or night, without a warrant, for contraband liquors.

SEC. 22. All places where alcoholic liquors are sold, bartered or given away in violation of this Act, or where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, or where alcoholic liquors are kept for sale, barter or delivery in violation of this Act, are hereby declared to be common nuisances, and any per-

son may go before any Trial Justice in the county and swear out an arrest warrant, on personal knowledge or on information and belief, charging said nuisance, giving the names of witnesses, against the keeper or manager of such place and his aids and assistants, if any, and such Trial Justice shall direct such arrest warrant either to the Sheriff of the County or to any special Constable, commanding said defendant to be arrested and brought before him to be dealt with according to law, and at the same time shall issue a search warrant, in which the premises in question shall be particularly described, commanding such Sheriff or Constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon, and dispose of them as provided in Section 33, and shall also seize all vessels, bar fixtures, screens, bottles, glasses and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and deposit the same with the Sheriff. That under the arrest warrant the defendant shall be arrested and brought before such Trial Justice and the case shall be disposed of as in case of other crimes beyond his jurisdiction, except that when he commits or binds over the parties for trial to the next term of the Court of General Sessions for the County he shall make out every paper in the case in duplicate and file one copy of the proceedings with the Clerk of the Court for the County and immediately transmit the other copy to the Solicitor of the Circuit, whereupon said Solicitor shall at once apply to the Circuit Judge, at chambers, within that Circuit, for an order restraining the defendants, their servants or agents, from keeping, receiving, bartering, selling or giving away any alcoholic liquors until the further order of the Court. Such Circuit Judge is hereby authorized, empowered and required to grant the said restraining order, without requiring a bond or undertaking, upon the hearing or receipt by him of said papers from the Court of said Trial Justice by the hands of the Solicitor; and any violation of said restraining order before the trial of the case shall be deemed a contempt of Court and punished as such by said Judge or Court, as for the violation of an order of injunction. Upon conviction of said defendants of maintaining said nuisance at the trial, they, or any of them, shall be deemed guilty of a misdemeanor, punishable by imprisonment in the State Penitentiary for a term of not less than three months, or a fine of not less than two hundred dol-

lars, or by both, in the discretion of the Court, and the restraining order shall be made perpetual. The articles covered by the inventory which were retained by the Sheriff shall be forfeited to the State and sold and the net proceeds sent to the State Commissioner, and the Sheriff shall forthwith proceed to dispose of the alcoholic liquors covered by said inventory as provided for in this Act as when other liquors are seized. The finding of such alcoholic liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this Act, shall be *prima facie* evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this Act. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt, by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the State Penitentiary not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this Act, the Court, or in vacation the Judge thereof, shall have power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the State. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answers to interrogatories, either written or oral, as in the discretion of the Court or Judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the fact stated in the moving papers. The Clerk of the Court shall, upon the application of either party, issue subpœnas for witnesses, and except as above set forth the practice in such contempt proceedings shall conform as nearly as may to the practice in the Court of Common Pleas.

SEC. 23. The State Commissioner, under rules and regulations provided by the State Board of Control, may enter into contracts with responsible grape growers in this State for

the sale of domestic wines through the Dispensary, so as to encourage grape growing in this State, and in furtherance of this object not more than ten per cent. profit to the Dispensary over the expenses of bottling, labeling, freightage, etc., shall be charged for the handling of such wines. The manager of every registered distillery of liquor in this State shall report quarterly to the State Commissioner, showing the number of gallons of each kind of liquor on hand, manufactured or disposed of during the quarter, and if the said report fail to correspond with the return of said distillery to the United States Internal Revenue Collector for this State, or it is shown that said manager has disposed of liquor contrary to this Act, said distillery shall be deemed to be a common nuisance, and the said manager and his aiders and assistants and the premises shall be proceeded against as in this Act provided as to places where liquors are sold contrary to this Act.

SEC. 24. In all cases of places where liquors are unlawfully kept or stored, the same not being in an open house or exposed to view, and a search being necessary, upon affidavit to that effect, or on information and belief that contraband liquor is in such place, a search warrant shall be issued by a Justice, Judge or Trial Justice, or Mayor, or Intendant of a city or town, to whom application is made, empowering a Constable, or any person who may be deputized, to enter the said place by day time or in the night time and to search and examine the said premises for the purpose of seizing the said contraband liquors therein concealed, kept or stored, which said liquor when so seized shall be disposed of as hereinafter provided.

SEC. 25. That any of the liquors set forth in Section one (1) of this Act which are contraband may be seized and taken without warrant by any State Constable, Sheriff or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, private person, firm, corporation or association, and reported to the State Commissioner at once, who shall dispose of the same as hereinafter provided: *Provided*, That liquors purchased outside the State, owned and conveyed as personal baggage, shall be exempt from seizure when the quantity does not exceed one gallon.

SEC. 26. That the possession of said illicit liquors is hereby prohibited and declared unlawful, and any obligation, note

or indebtedness contracted in their sale or transportation is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any Court in this State.

SEC. 27. That the proceeding against liquor so illegally kept, stored, sold, delivered, transported or being transported shall be considered a proceeding *in rem*, unless otherwise herein provided, elsewhere than at his or her residence.

SEC. 28. That the carriage, transportation, possession, removal, sale, delivery or acceptance of any of the said liquors or liquids in any package, cask, jug, box or other package, under any other than the proper name or brand known to the trade as designating the kind and quantity of the contents of the casks, packages or boxes containing the same or causing such removal, acceptance, transportation, taking into possession, or any such delivery, shall work the forfeiture of said liquors or liquids and casks or packages, and the person or persons so offending, knowingly, be subject to pay a fine of not more than five hundred dollars or imprisonment for the term of not longer than six months, and the wrongful name, address, mark, stamp or style on such liquor when seized shall be considered evidence *prima facie* of guilt. The books and way bills of the common carrier may be examined to trace said liquor to the shipper, who shall be liable, upon conviction, in a like penalty.

SEC. 29. That all Constables, Deputy Constables, Sheriffs or municipal policemen shall have the right, power and authority, and it shall be their duty, whenever they are informed or suspect that any such suspicious package in possession of a common carrier contains alcoholic liquors or liquids, to detain the same for examination for the term of twenty-four hours without any warrant or process whatever.

SEC. 30. That any interference by any person with, obstruction or resistance of, or abusive language to, any officer or person in the discharge of the duties herein enjoined, or the use of abusive language by any such officer or person to any other person or persons, shall, upon conviction, be deemed guilty of a misdemeanor and be punishable by a fine of not more than one hundred dollars or imprisoned for the term of not more than 30 days.

SEC. 31. In all cases of seizure of any goods, wares or merchandise hereafter or heretofore made, as being subject to forfeiture under any provision of this Act or the former Act,

which, in the opinion of the officer or person making the seizure are of the appraised value of fifty dollars or more, the said officer or person shall proceed as follows: *First.* He shall cause a list containing a particular description of the goods, wares or merchandise seized to be prepared in duplicate and an appraisement thereof to be made by three sworn appraisers, to be selected by him, who shall be respectable and disinterested citizens of the State of South Carolina, residing within the County wherein the seizure was made. Said list and appraisement shall be properly attested by the said officer or person and the said appraisers, for which service each of the said appraisers shall be allowed the sum of one dollar, to be paid by the State Commissioner. *Second.* If the said goods are believed by the officer making the seizure to be of less value than fifty dollars, no appraisement shall be made. The said officer or person shall proceed to publish a notice for three weeks, in writing, at three places in the County where the seizure was made, describing the articles and stating the time and place and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice. *Third.* Any person claiming the liquors so seized as contraband, and the vessels containing the same, within the time specified in the notice, may file with the State Commissioner a claim stating his interest in the articles seized, and may execute a bond to the State Commissioner in the penal sum of five hundred dollars, with sureties to be approved by the said State Commissioner, conditioned that in the case of condemnation of the articles so seized the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bond to the State Commissioner he shall transmit the same with the duplicate list or description of the goods seized to the Solicitor of the Circuit in which such seizure was made, and said Solicitor shall prosecute the case to secure the forfeiture of said contraband liquors or liquids in the court having jurisdiction. *Fourth.* If no claim is interposed and no bond given within the time above specified, such liquors shall be forfeited without further proceedings, and the State Commissioner shall have the said liquors tested by the State Chemist, and if pure shall sell the same through the State Dispensary as though purchased by him. If not pure, he shall sell the same beyond

the State and deposit the proceeds to the credit of the State Commissioner: *Provided*, That in seizures in quantities less in value than fifty dollars of such illicit liquor, or liquors, the same may be advertised, with other quantities, at Columbia, by the State Commissioner, and disposed of as hereinbefore provided: *Provided, further*, That the claimant of such liquors may give bond in one hundred dollars as when the value is fifty dollars or over, and shall bear the burden of showing before a Trial Justice that he has complied with the law and that the liquor is not liable to seizure.

SEC. 32. That all fermented, distilled or other liquors or liquids containing alcohol, transported into this State, or remaining herein for use, sale, consumption, storage or other disposition, shall, upon introduction and arrival in this State, be subject to the operation and effect of this law to the same extent and in the same manner as though such liquors or liquids had been produced in this State.

SEC. 33. That no person, except as provided in this Act, shall bring into this State, or transport from place to place within this State, by wagon, cart or other vehicle, or by any other means or mode of carriage, any liquors or liquids containing alcohol, under a penalty of one hundred dollars or imprisonment for thirty days for each offense, upon conviction thereof, as for a misdemeanor. Any servant, agent or employee of any persons, corporation or associations, doing business in this State as common carrier, or any person whatsoever, (except an officer seizing or examining the same) who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation at any place other than the usual and established stations, wharves, depots or places of business of such common carriers within some city or town where there is a Dispensary, and then only for such Dispensary, or who shall aid in or consent to such removal, shall upon conviction be subject to a penalty of fifty dollars or imprisonment for thirty days for every such offense: *Provided*, That said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation across the State: *Provided*, That this Section does not apply to liquors purchased from a Dispensary and bearing the proper label or certificate. All liquors in this State, except Dispensary liquors and those passing through consigned to points beyond, shall be deemed contraband and may be seized in transit without warrant. And

any steamboat, sailing vessel, railroad, express company or other common carrier transporting or bringing into this State for sale or use therein, except by the Dispensary, shall suffer a penalty of five hundred dollars and costs for each offense, to be recovered by the Solicitor of the Circuit, or the Attorney-General, by an action brought therefor in any Court of competent jurisdiction. The State Constables, Sheriffs, municipal police or any lawful Constable may enter any railroad car, or express car, or depot, or steamboat, or other vessel, without warrant and make search for such contraband liquors, and may examine the way bills and freight books of said common carriers, and any one interfering with or resisting such officer shall be punished by a fine not exceeding $100 or imprisonment not longer than 30 days.

SEC. 34. That any person detected openly in the act of violating any of the provisions of this Act shall be liable to arrest without warrant, provided a warrant shall be procured within a reasonable time thereafter.

SEC. 35. That violations of any of the Sections of this Act, where punishment upon conviction is not especially provided for, the person or persons or corporations so convicted shall be punished in the discretion of the Court trying the same. All alcoholic liquors, other than domestic wine, and in quantity more than five gallons, which do not have on the packages in which they are contained the labels and certificates going to show that they have been purchased from a State officer authorized to sell them are hereby declared contraband, and on seizure will be forfeited to the State as provided in Section 31: *Provided*, That this Section shall not apply to liquor held by the owners of registered stills. Persons having more than five gallons of liquor elsewhere than at his or her home, which they wish to keep for their own use, may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the State Commissioner and applying for certificates to affix thereto. After sixty days from the approval of this Act any liquor found in the State not having such certificates may be seized and confiscated. Persons having more than they wish to use may obtain certificates to ship beyond the limits of the State. Any person affixing, or causing to be affixed, to any package containing alcoholic liquor any imitation stamp or other printed or engraved label or device than those furnished by the State Commissioner shall for

each offense be liable to a penalty of ten days' imprisonment or twenty-five dollars' fine.

SEC. 36. Every person who dispossesses or rescues from a Constable or other officer, or attempts so to do, any alcoholic liquor taken or detained by such officer charged with the enforcement of this law, shall, upon conviction, be imprisoned thirty days or pay a fine of one hundred dollars.

SEC. 37. Any person handling contraband liquor in the night time, or delivering the same, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment for thirty days or one hundred dollars' fine.

SEC. 38. Any wagon, cart, boat or other conveyance transporting contraband liquor at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation; and to that end the officer shall cause the same to be appraised by three disinterested citizens, and unless recovered by claim and delivery proceedings and suitable bond shall be advertised and sold and proceeds sent to the State Commissioner.

SEC. 39. Every Dispenser when he sells a package containing liquor shall put a cross mark in ink on the label or certificate thereon, extending from the top to the bottom and from side to side. When any liquor is seized because it has not the necessary certificates and labels required by this Act, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed and that the whiskey is not contraband.

SEC. 40. That any railroad, steamboat, express company or other common carrier shall incur a penalty of treble the invoice price of any alcoholic liquors lost or stolen in transit to or from the Dispensary, whether shipped as released or not, such penalty to be recovered by action in any Court of competent jurisdiction.

SEC. 41. That it shall be unlawful for any person to take or to solicit orders, or to receive money from other persons for the purchase or shipment of any alcoholic liquors for or to such other persons in this State, except for liquors to be purchased and shipped from the Dispensary, and any person violating this Section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment not to exceed thirty days or by a fine not to exceed one hundred dollars.

SEC. 42. It shall be the duty of Sheriffs, Deputy Sheriffs and Constables having notice of the violation of any of the

provisions of this Act to notify the Circuit Solicitor of the fact of such violation, and to furnish him the names of any witnesses within their knowledge by whom such violation can be proven. If any such officer or Solicitor shall willfully fail to comply with the provisions of this Section, he shall, upon conviction, be fined in a sum not less than one hundred dollars nor more than five hundred dollars; and such conviction shall work a forfeiture of the office held by such person; and the Court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

SEC. 43. The Governor shall have authority to appoint one or more State Constables at a salary of two dollars per day and expenses when on duty, and two Chief Constables at three dollars each per day and expenses, to see that this Act is enforced, the same to be charged to the expense account of the State Commissioner, except as otherwise provided in this Act.

SEC. 44. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SEC. 45. That wherever in this Act it is provided that process shall issue upon an affidavit based on information and belief, the affidavit shall contain a statement setting forth the sources of information, the facts and grounds of belief upon which the affiant bases his belief.

SEC. 46. This act shall not be held or construed to in any manner repeal or affect laws prohibiting the sale of intoxicating liquors within certain distances of churches and schools.

SEC. 47. That brewers in this State of rice beer heretofore engaged in the manufacture and sale of rice beer containing not more than two per cent. of alcohol shall be allowed thirty days from the approval of this Act to dispose of their manufactured product now on hand.

SEC. 48. That Chapter 7, Title VII., of the Code of Civil Procedure of this State, entitled "Of Provisional Remedies in Civil Actions," shall not apply to any officer or person having duties to perform under this Act, and in no case shall an action lie against any such officer or person for damages to person or property as provided in said Chapter.

SEC. 49. This Act shall take effect immediately upon its approval.

Approved December 23d, A. D. 1893.

APPENDIX No. 2.

The Governor's Message.

The Court of Claims has, in its opinion rendered in this case, quoted from the message of one of the governors of South Carolina, to show that the dispensary system is a commercial enterprise primarily and was not enacted as a police measure. While protesting that no such inference can legitimately be drawn from the language of the message referred to, and also protesting that whatever the personal views of the governor of the State might be as to the purpose of the law, they can have no effect to change the legal construction to be placed upon the language of the statute itself; nevertheless as an answer to the proposition laid down in the court's opinion I give here an extract from the message of the governor of the State to the South Carolina General Assembly beginning January 8, 1901, showing conclusively, as I submit, that the dispensary law is not only on its face a police measure as such, but is so regarded and enforced by the State's officials.

EXTRACTS FROM THE MESSAGE OF GOVERNOR MCSWEENEY TO THE GENERAL ASSEMBLY BEGINNING JANUARY 8, 1901.

THE DISPENSARY.

The dispensary has been well managed during the past year, as the statement of the board of directors and the State commissioner, which will be submitted to you, will show.

The dispensary system and the management of the liquor question have occupied much of the attention of each legislature since the system was inaugurated. The dispensary has also been an issue in every campaign in the State since it was passed and has been more strongly opposed possibly than any other law that was ever placed on the statute books of this State. Every argument that could be brought to bear against it has been presented by some of the ablest intellects of the State, and yet, after a thorough canvass of each county and a presentation of the case to the people, the sys-

tem has been endorsed by decided majorities on four different occasions, and the principle is incorporated in our organic law.

Under the constitution the legislature may license individuals or corporations to sell under the rules and regulations governing the dispensary, or it may prohibit the sale and manufacture of liquors. Both of these plans have been thoroughly and exhaustively argued and advocated before the people, and the verdict every time has been decidedly in favor of the dispensary under the management of the State. This reference is made to emphasize what seems to me to be the duty of every patriotic citizen who loves his State and believes in democratic doctrine and republican institutions, and that duty is to submit to the voice of the people and go to work earnestly and conscientiously to improve and perfect a law which has received so many endorsements from those whom it directly concerns. The courts have held that under the police regulations the State has a right to take charge of the sale of whiskey. The question, when reduced to its last analysis, is not one of principle, but of expediency. What is the best method of dealing with this evil so as to secure the best results? That is the question.

The present system, as it may be improved from time to time, is the best solution yet devised and is growing in public favor. Much of the prejudice that has existed against the law is being removed, and many of those who oppose the system are in favor of the enforcement of the law. As public sentiment grows in its favor it will be easier to enforce it. The mayors and intendants of the towns and cities of the State, in response to a circular which I issued during November, state that the law is well enforced, and that the sentiment of the towns is for a strict enforcement. The exceptions are the cities of Columbia and Charleston and a few counties in which the sale of whiskey is prohibited by law. In fact in those counties in which no dispensaries are established it would conduce to a better enforcement of law, and there would be less illicit sale of whiskey if dispensaries were established. In the cities named the dispensary cannot be rigidly enforced so long as public sentiment upholds violators of the law and grand juries fail to find true bills and petit juries to convict when cases are made and the evidence furnished. As public sentiment grows in favor of the law in these cities and the prejudice against it dies away convictions

for violations will be had, and it can then be more rigidly enforced.

As a rule, however, the law has been well enforced, and it has been with a small constabulary force, but with the aid of the municipal officers. All law is violated. If there were no violators of law and this were an ideal country there would be no need of law or courts to try and punish offenders. The United States Government, with its illimitable resources, has failed to stop all violations of the revenue laws.

The present law might be made a little more explicit in some particulars, for in some respects it will take a judicial deliverance to determine what has been repealed and what re-enacted by the amendment adopted last year, and yet, in its practical operation, the law has worked very well.

While it is important that the law shall not be violated by illicit sale of whiskey, it is equally important that those charged with its administration shall conform to its requirements. If this were more rigidly done public sentiment would grow more rapidly in support of the system. I doubt if there is a dispenser in the State who does not violate the law every day, not with any criminal intent. The law requires that "before selling or delivering any intoxicating liquors to any person a request must be presented to the county dispenser, printed or written in ink, dated of the true date, stating that he or she is of age, and the residence of the signer, for whom or whose use it is required, the quantity and kind required, and his or her true name; and the request shall be signed by the applicant in his own true name and signature, attested by the county dispenser or his clerk, who receives and files the requests. But the requests shall be refused, if the county dispenser filling it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess; or if the applicant is not so personally known to said county dispenser, before filling said order or delivering said liquor, he shall require the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor and is not in the habit of using intoxicating liquors to excess." The county dispenser takes an obligation to the effect that he will and another afterwards that he does comply strictly

with this provision and all of the other provisions of the law.

It has become customary for county dispensers to sell to any one who applies to purchase without being identified or without signing the application "in his own true name and signature" and without stating "for whom or whose use it is required." Ample provision is made for the course to be pursued for violations in the administration of the law. The county dispensers are responsible to the county boards of control, and they are appointed by the State board of directors on the recommendation and with the advice and consent of the senator and representatives from each county. That brings the case right up to the door of the members of the General Assembly.

This is a business matter, and as careful and as prudent business judgment should be exercised in the selection of those who are charged with the administration of the law as a prudent business man would exercise in the selection of those whom he would place in charge of his private business. Politics and partisanship should have no part in the selection.

I again commend to you the advisability of abolishing the county boards of control and of devolving their duties upon the mayors or intendants of the towns and the county supervisors of the counties in which dispensaries are located. The towns and counties are directly interested in the proper management of local dispensaries, and the duties thus imposed would not be onerous. I also recommend that county dispensers be elected by the people, as other county officers are elected, for a term of two years. They would then be responsible to the people for a proper conduct of the business placed in their hands.

In the management of the constabulary it has been my aim and purpose to secure men of discretion and judgment, who would perform their duties without fear or favor, and at the same time without causing conflict between themselves and the citizens; and it is source of gratification to me that there has been no conflict.

APPENDIX No. 3.

The Dispensary System and the Loss (?) of Federal Revenue.

As an answer to so much of the opinion of the Court of Claims as advances the argument of loss of revenue to the Government if the dispensary system cannot be taxed I have argued in my brief (p. 23) that this loss of revenue could be many times made up by the increase in the moral and financial well-being of the country where this system of dealing with the liquor problem is adopted. As throwing further light upon the subject and not because I deem the loss-of-revenue argument to have in the slightest degree any bearing upon the legal questions involved in this case, the following historical and statistical note made up from official data may not be uninteresting. The report of the United States Internal Revenue Commissioner for 1892 shows that there were 1040 retail liquor dealers in South Carolina during the year 1891. The mere proposition, agitated about that time, to enact the dispensary law reduced their number to 970 in 1892. In 1894, the year following the enactment of the law, they were reduced to 840; in 1895, to 740; in 1896, when the dispensary constabulary had learned how to deal with these illicit dealers, to 335, and in 1902, to 260—that is to say, one-fourth the number that existed *before* the establishment of the dispensary system. These were of course all illicit dealers, or "blind tigers," as they are facetiously called in South Carolina. Their number is known by the fact that the illicit dealer always pays the special tax of $25 to the United States, as he finds it cheaper to pay that sum than to run the risk of prosecution by the Federal Government. But it does not secure them immunity from the State constabulary, and the message of Governor McSweeney to the South Carolina Legislative Assembly printed in this Appendix shows the manner in which they are unweariedly pursued by the State officials. The report of the U. S. Internal Revenue Office shows that in the year 1900 there were 436 retail liquor dealers paying a special tax of $25 each to the United States Government. Of these 94 were State dis-

pensaries. It is hardly fair to the State to compare the general average of the sales of these illicit dealers with the sales made by the open bar-rooms in non-dispensing States; but, giving the opponents of the dispensary system that advantage, it appears from the table which will be found at the end of this note that in the State of New Jersey the number of liquor dealers to the population in the year 1900 was fifteen times greater than in South Carolina; in New York it was fourteen times greater; in Illinois twelve times; in Indiana ten times; in the neighboring State of Maryland nine times; in Pennsylvania seven times; in Massachusetts five times; in Georgia and North Carolina, two States adjoining a dispensary State, and where there are some dispensary counties and local-option counties, the number in each was only two times greater; while in the *total-prohibition* States of Maine and Kansas there were, respectively, *five* and *six* times as many retail liquor dealers paying a license tax to the United States Government in proportion to the population as there were in the dispensary State of South Carolina.

What volumes do these facts speak in favor of the dispensary system as a police and temperance measure over the total-prohibition system! But there is a more astonishing exhibit than this.

The American Grocer, one of the leading journals of the grocery trade of the United States, published in its issue for March 25, 1903, its annual estimate of what it calls "The Nation's Drink Bill." The estimate is evidently the result of conservative and intelligent work based upon the figures of the United States Bureau of Statistics, and is as follows:

Total amount paid in 1902 by the people of the United States for alcoholic stimulants, including beer.....	$1,172,565,235
Per capita expenditure to the population.....	17.33

The above figures do not include the amount used in the arts and manufactures.

The report of the Board of Directors of the South Carolina Dispensary for 1902 shows the total receipts of the dispensers throughout the State for alcoholic liquors, including beer, to be $2,406,213. The profits received by the State from the beer dispensers were for the same year $60,515.40,

which, upon a 10 per cent. basis, would make their total sales amount to $605,154, making a grand total of $3,011,367 paid for alcoholic stimulants by the people of the State under the dispensary law. These figures, however, do not include the sales made by the so-called "blind tigers," or illicit dealers. These men keep under cover and work in the dark, and it is probable that at least three-fourths of them carry on their business in the two principal cities of the State—Charleston and Columbia, whose combined population scarcely exceeds 85,000. They probably do not, all of them together, sell one-fifth as much liquor as is sold openly and above board by the county dispensers throughout the State with its population of 1,350,000; to those familiar with the conditions surrounding them it is difficult to conceive how their total sales can amount to half a million dollars annually, but conceding that the total sales of these illicit dealers during the year equal the sales made by the dispensers, viz., $3,011,367, then the grand total of the liquor bill of the people of the State of South Carolina for the year 1902 was as follows:

Total sales by dispensers and illicit dealers..... $6,022,734

Placing the total population of the State for 1902 at 1,350,316, or only ten thousand more than the census return for 1900, this is a *per capita* expenditure of within a fraction of $4.45. As we have seen, however, it would be nearer the actual truth to state it at not more than $3 *per capita*. In other words, conservative estimates, based upon official reports, show that under the State's dispensary system the average citizen of South Carolina consumes as a beverage from one-fourth to one-sixth the alcoholic stimulants consumed by the average citizen of the United States. These figures, it is true, are but estimates; but they are based upon *official* reports, State and Federal, and are undoubtedly a close approximation to the real facts. This is what the dispensary system has done and is doing for the State of South Carolina.

Statement of the Number of Retail Liquor Dealers in Some of the Principal States of the Union for the Year 1900 as Compared with the Population of that Year.

State.	Population.	Number of retail liquor dealers.	Number of persons in the State to each liquor dealer.	
South Carolina	1,340,316	436	3,074	
New York	7,268,894	34,044	213	14
Pennsylvania	6,302,115	16,089	391	7*
New Jersey	1,883,669	9,504	195	15
Illinois	4,821,550	18,690	252	12
Indiana	2,516,462	7,980	315	10
Virginia	1,854,184	2,888	642	4½
Massachusetts	2,805,346	4,766	588	5
Georgia	2,216,331	1,254	1,719	2*
Maryland	1,188,044	3,541	335	9
North Carolina	1,893,810	1,537	1,232	2
Maine	694,466	1,151	600	5
Kansas	1,470,495	2,756	507	6

* Nearly. The figures in the last column show (approximately) the ratio between South Carolina and the other States—rating that State as 1. Thus in New York there are 14 times as many liquor dealers as in South Carolina.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210 /O.

STATE OF SOUTH CAROLINA

vs.

UNITED STATES.

SUPPLEMENTAL BRIEF.

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
Attorneys for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15320

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210.

STATE OF SOUTH CAROLINA

vs.

UNITED STATES.

SUPPLEMENTAL BRIEF.

While little remains to be added to the excellent brief already presented in this case on behalf of the State of South Carolina by Mr. Franklin H. Mackey (now deceased), the undersigned desire to submit as briefly as may be a view of the case which has strongly impressed them as being correct, and which, if well founded, presents a narrow issue, upon which the whole case may be disposed of.

It is not the purpose of the writers, before entering upon this particular view, to amplify to any great extent the positions taken by Mr. Mackey, but they insist that they are not required to discuss or will it be necessary for the court to consider whether the institution of dispensaries in the State of South Carolina was an exercise of the police powers of the State or was so purely commercial in character as to make the State treating the liquor question in this fashion a common commercial trader.

In a few words, we may say, however, that in our view the dispensary system of South Carolina comes well within the police powers of the State, for if a State may take a perfectly worthless piece of paper and, by stamping certain arrangements of words and figures upon it, sell that paper as a license to an individual to carry on the liquor business, making thereby a direct profit of an infinitely large per cent., it does no act differing in any degree in principle if, instead of selling such paper carrying with its possession a privilege, it sells the liquor itself. In either event, the object, the prime object, is to control within certain fixed limits the traffic in an article, the excessive use of which is confessedly an evil, and it may not be said that because under one system or the other a profit arises to the State, therefore the police powers of the State are being improperly exercised for commercial ends.

As bearing upon this point, the writers cannot do better than quote the language of Chief Justice Taney in the License cases, 5th Howard, page 583, to the following effect:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty; the power to govern men and things within the limits of its dominions. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its authority to pass health laws, except in so far as it has been restricted by the Constitution of the United States. * * * Upon this question, the object and method of the State are of no importance, and cannot influence the decision. It is a question of power."

But in the judgment of the undersigned this particular question was placed beyond argument by the decision of the

court in Vance *vs.* W. A. Vandercook Co., 170 U. S., 444, holding that—

"Beyond dispute, the respective States have plenary power to regulate the selling of intoxicating liquors within their borders, and the scope and extent of such regulations depend wholly on the judgment of the law-making power of the States; provided, always, they do not transcend the limits of State authority by invading rights which are secured by the Constitution of the United States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other States of the Union."

And in the same case, on page 447, it is said:

"From the fact that the State law permits the sale of liquor, subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State."

We are therefore justified in saying broadly and absolutely, as we believe, that the Supreme Court has recognized, in the case last cited, the South Carolina dispensary law as being a proper exercise of the police power.

It remains, therefore, to consider whether the United States has a right to interfere with the exercise by a State of its sovereign police power by the levying of a tax upon the instrumentalities used by it and whether in fact it has undertaken to levy such a tax. That it cannot tax the instrumentalities through which a State exercises its sovereignty has, as it seems to us, been a closed question since the case of Collector *vs.* Day, 11 Wallace, 113, if indeed we might not say since the decisions upon which that case was rested; and if the United States may, by a tax upon one exercise of the right of sovereignty, limit or destroy it, so may it, with equal right, limit or destroy every other exercise of sovereignty, and thus enfeeble or extinguish the autonomy of the States.

That the tax in this case was collected from the State of South Carolina and its instrumentalities is perfectly evident

from a review of the findings of the Court of Claims, which are particularly full upon this point.

The Court of Claims found that "the United States collector of internal revenue for the district of South Carolina has required the State dispensary commissioner and the county dispensers * * * to pay a special tax," etc.

It also found (third finding) that the State dispensary commissioner had drawn his warrant annually upon the State treasurer in favor of the collector for the special taxes claimed and demanded by him.

In its fourth finding, it found that such warrants were paid by the State treasurer to the collector, and by him paid into the Treasury of the United States.

According to its fifth finding, all the liquor sold by the dispensary agents during the years mentioned in its opinion was the property of the State of South Carolina, and all the profits and losses arising from said sales accrued to the said State; that the dispensers never have had any proprietary interest of any sort in the liquor sold or in the profits derived therefrom.

In its eighth finding it was declared that there was established in the city of Columbia a wholesale department where all liquors purchased by the State commissioner were kept and from which the various retail dispensers received their supplies, but that neither the State commissioner nor the dispensers had any property interests therein, the same being the property of the dispensary system.

According to its eleventh finding the payments made for special license taxes were sometimes made to the United States internal-revenue collector in cash and sometimes by warrant, the form of the warrant being set out and showing that it was paid under the State dispensary account and receipted for by the collector for business carried on at specified dispensaries.

We now come to the important question as to whether—granting, *arguendo*, that we are entirely wrong in the position

so far taken—the internal-revenue laws by their terms apply to the sovereign States of the United States.

In approaching this point we insist upon the relevancy of the expression of Blackstone (1 Comm., p. 261) as to the powers of the King, and, as far as may be, apply it to a Federal State:

"The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate, etc.') affect not him in the least if they may tend to restrain or diminish any of his rights or interests. * * * Yet when an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the King as upon the subject, and, likewise, the King may take the benefit of any particular act, though he be not especially named."

We also remember that when the internal-revenue law was enacted no State regulated the liquor traffic as South Carolina now does, and Congress did not, therefore, have it in mind to, and, as we shall argue, did not, frame a law to apply to States.

Section 3140 of the Revised Statutes originally read as follows:—

"The word 'State' when used in this title shall be construed to include the Territories and the District of Columbia where such construction is necessary to carry out its provisions."

By the act of February 27, 1877, the following definition of the word "person" was added to the foregoing section:

"And where not otherwise distinctly expressed or manifestly incompatible with the intention thereof, the word 'person' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

When Congress undertook to define, as it did in 1877, the word "person" to "mean and include a partnership association, company, or corporation, as well as a natural person," it necessarily excluded everything beyond the things necessarily included, and excluded therefore everything which was not a business association of natural persons, and we therefore invoke the principle *inclusio unius est exclusio alterius*.

It would have seemed natural that if Congress had intended the title "internal revenue" to apply to States, as well as to individuals, either singly or in association, the desire should have been expressed when the word "State" was defined, or if not then, at least when the word "person" was defined as including, among other things, corporations. If, however, so far as the text is concerned, we are to find in it authority extending the internal-revenue laws over States, it must be either because States are "persons" or "corporations."

Is a State a person within the sense of the internal-revenue law? We shall waive for the moment discussion of the various features of the law, which to our mind conclusively establish that a State never was considered by Congress to be a person in this sense, and confine ourselves to the general course of decisions.

It is true that for the purpose of effectuating justice and sustaining the jurisdiction of courts, States have been held to be persons (Republic of Honduras *vs.* Soto, 112 N. Y., 310; Martin *vs.* The State, 24 Texas, 61), but this is not the ordinary or legal interpretation of the word. In fact, referring to the New York statute of descents, the Supreme Court (U. S. *vs.* Fox, 4 Otto, 315) held that:

"The term 'person' as here used applies to natural persons and also to artificial persons—bodies politic, deriving their existence and powers from legislation—but cannot be so extended as to include within its meaning the Federal

Government. It would require an express definition to that effect to give it a sense thus extended."

(See also McBride *vs.* Pierce County Commissioners, 44 Federal, 17.)

It was argued on behalf of the Government in the Court of Claims that the Supreme Court in Salt Lake City *vs.* Hollister, 118 U. S., 256, held Salt Lake City to be a person within the meaning of the revenue laws. This, we think, was a clear error. The Supreme Court treated Salt Lake City as a corporation throughout the whole opinion. We need not argue the difference between a corporation like this, created by the authority of Congress itself, and a State.

We are not unmindful of the fact, also, that for the purpose of maintaining covenants of warranty a different rule of interpretation has been followed (West Coast Manufacturing Co. *vs.* West Coast Improvement Co., 25 Wash., 667; 62 L. R. A., 763), but such decisions given to sustain private rights have no place in this discussion.

But is a State a corporation? We will not repeat the argument of Mr. Mackey, but again call attention to State o Georgia *vs.* Atkins, 35 Georgia, 315, quoted with approval by the Supreme Court in U. S. *vs.* Railroad Co., 17 Wall., 322, demonstrating that a State is not a corporation within the meaning of the revenue laws.

We do not at this time trouble the court with a repetition of the cases cited in the brief of Mr. Mackey tending to demonstrate that States do not come within the internal-revenue laws of the United States.

A State is more than a person. It is more than a corporation. It is a constituent part of the United States and surely at least as important as firms, associations, and corporations expressly enumerated in the statutes.

A State is a sovereign power; itself the creator of corporations, while it may fairly be argued that when the statute enumerated "partnership, association, company or corpora-

tion, as well as a natural person," the law-maker had in mind individuals or associations of individuals gathered together solely for business convenience, and not a sovereign power. There is a natural relation between partnerships, associations, companies, corporations, and natural persons. The State is not one with them, but above and beyond and controlling them. To read into the act the word "State" would be to read in a word having no logical association with the other words of the act, everything considered.

In interpreting the statute, therefore, we confidently appeal to the doctrine expressed by the words *noscitur a sociis*, as approved by this court in Arthur *vs.* Moller, 7 Otto, 365.

But let us approach the matter from another point of view. It seems to the writers that without certainly the clearest intention on the part of Congress a State should not be placed within the terms of a revenue act—an act which in many of its features approaches a branch of the criminal law. It cannot naturally be the case that a State is to be hunted down for violation of law nor its representatives confined in jail because of failure to meet requirements of a statute. Such a theory, we repeat, could only be justified by the strongest and clearest possible language in the act.

Let us now see if the Revised Statutes could have had any relation whatsoever to States. By section 3233 we find:

"Every person engaged in any trade or business on which a special tax is imposed by law, shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same and their places of residence shall be so registered."

Shall we suppose that the law ever contemplated that a State should register with the collector of a district its "name or style, place of residence, trade or business, and the place

where such trade or business is to be carried on"? The idea seems preposterous.

Again, section 3239, as amended in 1877, requires that—

"Every person engaged in any business, avocation or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of such special tax; and any person who shall through negligence fail to so place and keep said stamps, shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the cost of prosecution; but in no case shall said penalty be less than $10.00. And where the failure to comply with the foregoing provision of the law shall be through wilful neglect or refusal, then the penalty shall be double the amount above prescribed."

Shall we consider that a State is a person engaged in any business, avocation, or employment except that of government? Shall we believe that it was the intention of Congress to make it liable for the negligence of its agents in failing to keep stamps in a conspicuous place in its dispensaries? Shall we conceive that a State can be guilty of wilful neglect or refusal, subjecting it to condign punishment at the hands of the Federal Government? Surely to entertain such ideas is to be prepared to overturn all our theories of constitutional government.

Again, we find under section 3242, supplemented and enlarged by the act of February 8, 1875, chapter 36, section 16, that any person who shall carry on the business, among other things, of a wholesale or retail liquor dealer without having paid a special tax shall be fined not less than $100 nor more than $5,000, and imprisoned not less than thirty days nor more than two years. While it becomes physically impossible to confine a State in jail, it is, of course, feasible to commit its representatives to the custody of the law; but can we believe that Congress intended that a State, whether administering a police function or not, selling liquor through

its dispensaries, should for an infraction of law be subject through its agents to indictment and fine? What theory could be imagined more subversive of the orderly processes of government than this?

It is suggested in the opinion of the Court of Claims in this case that we are seeking to import into the statute an exception not contained therein. This is, we think, an entirely erroneous statement of the issue. We are not seeking to import anything into the statute. We insist upon the statute as it stands, but the Government, in order to set up a defense, seeks by construction to find in the statute the word "State," and, so finding, to escape the consequences of this action. The most that could be said for the position of the Government is that the present is a case of *casus omissus*, and, under the decisions of this court, it is without power to supply a lacking word.

In the case of Denn *vs.* Reid, 10 Peters, 527, the court says:

"It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

(Cited with approval in Bate Refrigerating Company *vs.* Sulzberger, 157 U. S. 37.)

So in Board of Lake County Commissioners *vs.* Rollins, 130 U. S., 662, it was held:

"If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

In conclusion, we urge that the question as to whether the dispensary law of South Carolina is a just exercise of the governmental powers of that State is entirely unimportant until this court shall first decide that the internal-revenue

laws have reference to the conduct of a State, and, submitting as we do that the statute is clear and unequivocal and never was intended to refer to States, an extensive discussion of the general functions of government or the relations between the State governments and the United States Government becomes unimportant.

JACKSON H. RALSTON,
FREDERICK L. SIDDONS,
Attorneys for Appellant.

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Supreme Court, U. S.
FILED
APR 10 1905
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE STATE OF SOUTH CAROLINA, appellant,
v.
THE UNITED STATES.

No. 270.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE STATE OF SOUTH CAROLINA, appellant, v. THE UNITED STATES. } No. 210.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

The question in the case is this: Can the States of the Union, in the exercise of their police power, engage in the monopolistic sale of spirituous, vinous, and malt liquors as beverages, exempt from the Federal special-license tax imposed upon persons engaged in similar occupations, pursuant to Article I, section 8, of the Federal Constitution?

The State of South Carolina sues to recover $22,840.71, the amount of the internal-revenue special tax on wholesale and retail liquor dealers paid by "State and county dispensers" from 1895 to 1903.

The findings of fact may be reduced to the following essential statements: Under the State law of December 24, 1892 (21 S. C. Stat., 62), "to prohibit the manufacture and sale of intoxicating liquors as a beverage

* * *, except as herein provided," with its subsequent amendments (e. g. and particularly, act of December 23, 1893, 21 S. C. Stat., 430), South Carolina maintains many "dispensaries" for the wholesale and retail sale of liquor. The United States has demanded and collected the usual taxes from the dispensers as liquor dealers; the dispensers have regularly filed the statutory "return" or application and obtained the customary license or special tax receipt, and the State, by warrant on its treasury or in cash, has paid the taxes; and the State alone profits from the business. The Federal law (R. S., secs. 3226–3228) prescribes certain methods of appeal to the executive for remission or repayment in proper cases of internal taxes. No application thereunder for refund has been made by the State or the dispensers In one year (1901) the profits of the State liquor business were over a half million dollars on gross sales of about two million. Notwithstanding the professed prohibition and rigid State control, as contemplated in her law, it is notorious that many private individuals are selling in competition with the State. The State applied for a trade-mark for this business under a pretext (apparently) that it was engaged in foreign trade.[a] In 1901, but not before, the State began to pay these taxes under a so-called protest.

[a] See *South Carolina* v. *Seymour* (153 U. S., 353). The law until recently permitted trade-marks for use only in commerce with foreign nations and Indian tribes, and not in interstate commerce; act of March 3, 1881, 21 Stat., 502, act of February 20, 1905, not yet published in the permanent volume.

The State scheme for purchase of supplies and sales—for wholesale and retail handling—and the "dispensary regulations" show the ordinary incidents and rules of a commercial liquor business and little more.

The Court of Claims delivered a practically unanimous opinion, Judge Wright concurring "in the conclusion, but not in all that is said." Their view was that this was the first attempt of a State to unite in one undertaking an exercise of the police power and a commercial business, the State contention resting on the principle that the dispensary system is an exercise of its police power beyond the interference of the General Government, which has no constitutional power to tax the administrative agencies of a State government. But the court thought that, allowing full scope to the police power and the right to prohibit or regulate the sale of intoxicants, here the State proceeds further, into the domain of private commercial business which is subject to a tax authorized by the Constitution and imposed by statute; that the police power extends no further than the general welfare, which is one thing, while exemption from taxation is another. It was held that this case does not fall within the rule exempting State agencies of government from Federal taxation, because this is an excise and not a tax, and exemption would benefit only the purchaser of liquor; because the dispensary operations are intrinsically business and not government, and being business are subject to the same national tax which is borne by all other persons engaged in the same business; because,

regarding the inconveniences and consequences of the logic, a State pursuing this policy could claim to be relieved of import duties, or, choosing to manufacture, could escape the distiller's tax. The State has the right to exercise its police power to use untrammeled all proper instrumentalities of government to enter into commercial business for profit; but "none of these rights can be exercised as an evasion of the National Government's right to impose an excise tax and to subject all persons, whether State or private corporations or individual dealers, to the same law." And the court found no difficulty in bringing the State within the notion of a "person" or "corporation," which terms "are broad enough in statutory construction to include the corporate side of a government or municipality. * * * The exemptions of sovereignty extend no further than the attributes of sovereignty."

The important provisions of the State law of 1892 are as follows:

Section 1 provides that the manufacture, sale, etc., of intoxicating liquors within the State shall be regulated and conducted as provided by this act. By section 2 the governor is authorized to appoint a commissioner,

> who shall, under such rules and regulations as may be made by the State board of control, purchase all intoxicating liquors for lawful sale in this State, giving preference to manufacturers and brewers doing business in this State, and

> furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereinafter prescribed in this act. * * * He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina College and declared to be pure and unadulterated. * * * The State commissioner shall not receive from said county dispensers for such liquors sold to them more than 50 per cent above the net cost thereof, and all amounts so received by him from said sales shall be by him paid over to the treasury of the State monthly * * * and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amount necessary to pay the expenses incurred in conducting the business of said agency.

Section 5 forbids the purchase of liquors by county dispensers from anyone other than the State commissioner, and the sale of liquors other than those so purchased. By section 6 county dispensers alone are allowed to sell and dispense liquors, and it is provided that manufacturers of liquors doing business in the State shall sell to no person in the State except to the State commissioners and to parties outside of the State. Section 10 provides that "all profits, after paying all expenses of the county dispensary, shall be paid one-half to the county treasury and one-half to the municipal corporation in which it may be located; such set-

tlements to be made monthly." Section 25 provides as follows:

> No person shall knowingly bring into this State, or knowingly transport from place to place within this State * * * any intoxicating liquors with the intent to sell the same in this State in violation of law, or with intent that the same shall be sold by any other person, or to aid any other person in such sale, under a penalty of five hundred dollars and costs for each offence, and in addition thereto shall be imprisoned in the county jail for one year. * * * All such liquors intended for unlawful sale in this State may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. * * *

These are the essential provisions of the scheme. The act or amendment of 1893 reenacted the law with some additions and changes, which I have sufficiently discussed below. It is substantially the same plan all through the legislation. The act of 1893 did not repeal the act of 1892. The act of 1893 contains the usual and formal provision that "all acts or parts of acts inconsistent with this act are hereby repealed," but wherever a change was intended, the former law was specifically supplied, the repeal was not express and general, and the act of 1892 is the foundation of the enterprise and survives in and through the whole series of acts. If the act of 1893 "repeals" the act of 1892, then in precisely the same sense the act of 1894 (Stat. S. C., 1894, p. 721) repeals the act of 1893, the

act of 1896 (Stat. S. C., 1896, p. 123) repeals the act of 1894, and so on.

The Federal law, with its enumeration of "persons" and entities embraced, is as follows:

> SEC. 3232. No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.
>
> SEC. 3244. Special taxes are imposed as follows: * * * Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors. * * * Wholesale liquor dealers shall pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer. * * *
>
> SEC. 3140. * * * Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person," as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.

ARGUMENT.

I.

JURISDICTION.

The reasons on the score of jurisdiction why this claim is not good are these:

The State really paid the taxes. The applications for license, however, are signed by the dispensers as individuals, and their official relation is not disclosed further than by the use of that term, "dispenser" or "county dispenser." The State argues that it never paid or authorized payment, but its agents acted without authority. There can not, of course, be any question that the State as such and acting through her proper officers and authorities recognized her obligation to pay these taxes without demur until April 4, 1901. But if the argument is true that the State has never been assessed and has never paid the money, how can she sue to recover? If the suit is maintainable at all, should it not be brought in the names of the dispensers to the use of the State?

Again, this point, that the dispensers paid the taxes and not the State, suggests that on the assumption of payment under mutual mistake of law there can be no recovery. This principle has been ruled against claimants in a suit by private persons in *United States* v. *Edmonston* (181 U. S., 500), in which the court, by Mr. Justice Brewer, points out the strictness of the rule and the irrelevancy of discussion on equities or moral obligation, which manifestly could not be suggested here. This doctrine would appear to be appli-

cable to a case where money belonging to a State has been paid out under a mistake of law. In *Wisconsin Central Ry. Co.* v. *United States* (164 U. S., 190) it was shown that the Federal Government could not be prejudiced by the erroneous action of its officers, and certain previous excess payments by the United States were allowed as a counterclaim. If that is equally true of a State government, the force of the rule can be worked out here in favor of the State through the official bonds of dispensers, to which she has recourse.

That doctrine really does not apply here in any aspect, because the payment by the State's agents was in no conceivable sense a mistake of fact, nor was it a mistake of law. The payment was made during much of the period voluntarily, without question or cavil. The letter of the State dispensary commissioner of 1901 says that the payments are "illegally required" and "demanded" by the collector and are made only for that reason and to avoid possible conflict between Federal and State officials. There is no suggestion of "mistake" as to past or current payments.

The truth is that the opposing argument on jurisdiction is hopelessly double. It claims the right of return on the ground of mistake and by equitable principles, *ex æquo et bono*, because the money of the State was improvidently paid, and the United States should hold it in good conscience to the State's use, citing decisions in the Court of Claims and *United States* v. *Bank* (96 U. S., 30), where the money was paid to the United States by the *fraud* of an agent. How can it be said

here that the money has been unlawfully obtained by mistake of all parties? The collector did not *compel* payment in any sense other than that all persons engaged in this business must pay or refuse or neglect at their peril. The payments were conscious and deliberate; they were in all senses voluntary until the so-called protest of 1901. The point that the State can not comply with the regulations for executive refund because these contemplate an assessment which "*he*," a person, paid, etc., while the State has not been assessed and has not paid, begs the question. The argument is that although all of the State's officers joined in the application and payment without any question until this afterthought was brought forward, the State itself did not pay and yet may turn round and recover. "What was paid, it is true, was the money of the State, but it was paid by persons having no authority." The argument comes right back to the proposition that "Congress, of course, never intended the internal-revenue laws to apply to a State." The State would not yield in advance the very contention upon which she bases her claim for relief. The question is not at all like that in Fassett's case and the Insular cases. These decisions held that to follow the executive remedy the main question would have to be conceded, viz, whether the vessel was *imported* merchandise; whether the goods entering from the islands were *importations*. Here the underlying question is, of course, whether the State is at all liable to the tax on the ground that, exercising her police power, she must

be exempt. But that can not cloak the proposition that either she or her agents ought to have applied for executive refund of the money which the agents paid, whether rightly or wrongly. The State can not say that she was not assessed and did not pay, and therefore that neither she nor her agents, who did pay, ought to have applied for the refund, and then turn round and say that after all the money was hers and she is entitled to recover in the judicial forum.

Counsel are thus far right in the view that the State did not pay; the assessment was made against the dispensers selling the liquor, and they paid. The tax was one of the expenses of conducting the enterprise. The expenses have been audited and allowed by the State through all its agencies, and it is difficult to see how there can be a cause of action in the State, as such, for the money so paid.

The statutes contemplate and require (R. S., secs. 3226–3228) an appeal to the Treasury as a condition of the right to bring suit for the recovery of internal taxes alleged to have been erroneously or illegally collected. The State excuses itself for failure thus to proceed by the same argument, viz, that the State did not pay the money, with the further suggestion that if she had applied to the Treasury for refund she would have surrendered her contention that she is not within the compulsions of the internal-revenue laws. She says that certain persons, the dispensers as her agents, paid the taxes, and did so unlawfully, because they were mere agents or instrumentalities of the State,

which could not be legally assessed. But if that is true, what was to hinder these persons from making application for repayment in the manner and form provided by the statute?

So that this is the State's dilemma, founded upon her own argument: If she did not pay the money, she has no right to recover at all; if her agents paid it, either rightly for her or wrongly to her injury, then either she or they ought to have pursued the executive remedy before seeking the courts. The State stands on the argument that, in order to get before the Treasury, the State must yield in advance the very contention upon which she bases her claim for relief, viz, she is not within the provisions of the law, never was assessed and never paid any tax, which the dispensers upon illegal assessment paid with the State's money but without authority from the State. The State's attitude was thus expressed by counsel below, and it certainly appears to be inconsistent:

> The secretary has made regulations for the recovery of taxes paid by the appellant himself, while in the case at bar the State never paid nor authorized to be paid the money which it seeks to recover, nor has the State ever been assessed this tax.

If the State has not been assessed and has not paid, it is difficult to see how she can institute an action to recover back, and the case would seem to be controlled by the decision in *Nichols* v. *United States* (7 Wall., 122).

How can the Nichols case be differentiated from the case at bar, except by saying that the State is not a taxpayer and is not a person? And that again begs the question. The point decided in that case was that the statute having provided for an appeal to the Commissioner of Internal Revenue, that remedy is exclusive, and that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims. The argument here is simply another *petitio principii*, viz, that the case at bar is not a revenue case, since the State is not and can not be made a taxpayer by the Federal Government.

Thus, returning to the conception of a voluntary payment, it seems clear that the jurisdictional question controls, and that there is really no constitutional question for the court to pass upon. The case must go out of court before the constitutional question is reached. In *Chesebrough* v. *United States* (192 U. S., 253, 259) the Chief Justice, delivering the opinion of the court, said:

> The rule is firmly established that taxes voluntarily paid can not be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made

voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.

II.

THE MERITS.

But neither the State nor her officers are entitled to refund in the executive or judicial forum, and there is no merit whatever in her claim in any aspect.

(A) The State is fairly covered by the language of the law.

The enumeration of those liable for the tax is "every person who carries on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills" (sec. 3242). It is simple reason to say that the intent of the legislature is as far-reaching as the attraction of the business and includes all natural and artificial or abstract persons who choose to engage in it. The tax is imposed under the constitutional rule of uniformity. Of course it is probable that Congress never imagined that a sovereign State would choose to enter this field; but that does not signify a *casus omissus*. It seems, however, that one State undertook for a short time an experiment not precisely the same but similar, but the law was declared unconstitutional (*Beebe* v. *State*, 6 Ind.,

501; *Herman* v. *State*, 8 Ind., 545). This was before the enactment of the Federal law. A third State has made an unconstitutional attempt to embark in a different business (*Rippe* v. *Becker*, 56 Minn., 100). And the South Carolina law was first declared unconstitutional (*McCullough* v. *Brown*, 41 S. C., 220), and then sustained after the complexion of its Supreme Court had changed (*State* v. *Aiken*, 42 S. C., 222). Under such circumstances this court will not be bound by the State court's view of its law (*Gelpcke* v. *City of Dubuque*, 1 Wall., 175, 205, 206).

There are many State authorities for the proposition that a State is a corporation, and that the word "person" in a statute may include a State on its corporate and municipal side as distinguished from its sovereign character.

Martin v. *State* (24 Tex., 61); the "intent to defraud any *person*," in a statute punishing falsification of public records, embraces a State.

State of Indiana v. *Woram* (6 Hill (N. Y.), 33); a State is a corporation, may be payee of a note, and "person" includes it.

Lancaster Co. v. *Trimble* (34 Nebr., 752); a county is a person in the legal sense.

Kansas v. *Herold* (9 Kans., 194); the United States is a "person" within a statute making it an offense for any person to cut down timber, etc., "on the land of any other *person*."

Republic of Honduras v. *Soto* (112 N. Y., 310); a foreign government is a person under a law requiring a

non-resident defendant, "a person residing without this State," to give security for costs.

In *Salt Lake City* v. *Hollister* (118 U. S., 256) this court had no difficulty in determining that a municipality engaging in the manufacture and sale of liquor was subject to the special license tax of the internal-revenue laws. It is true that Utah was then a Territory, and there was no question there of the taxation of *State* instrumentalities. It is also true that there are many cases in which it has been held that the word "person" does not include a State. But all these are cases in which so to have construed the law would have been tantamount to declaring it unconstitutional, because adjudging that the Federal Government could lay a tax upon the property or legitimate instrumentalities of a State. Congress is not presumed to have passed an unconstitutional act, and therefore the word was given its primary significance and held to exclude a State. The controlling factor, as always, is the intention of the legislature; and the term "person" or "corporation" is broad enough to embrace a State, if necessary, to effect the intent of Congress. There can be no real doubt that the object of Congress was to levy this excise on the business by whomsoever carried on; I have shown that to effectuate the intent, "person" has been held to include a municipal corporation, a State, the United States, and a foreign State; and the real inquiry thus is seen to be whether the State dispensary system is a proper exercise of the State police power. If not, there can be no question that the statu-

tory language and intent covers the State; if so, the tax is unconstitutional on fundamental grounds, for the United States is then assuming to tax a proper administrative agency or instrumentality of the State.

As to opinions of Attorneys-General cited by opposing counsel, holding that the word "person" in certain provisions of internal-revenue laws does not include a State (e. g., 12 Op., 176, 277, 376, 402; 13 Op., 67, 439)—the opinion of Mr. Stanbery (12 Op., 176), holding that State bank notes were not taxable under the internal-revenue laws, has been overruled by the case of *National Bank* v. *United States* (101 U. S., 1). Other opinions exempted from Federal taxation railroads owned by a State, articles manufactured by convicts in a State penitentiary or house of correction, for the use of the State, dividends on stock owned by a State, and interest on a municipal loan. But all these objects were clearly either the property of the State or its instrumentalities, and were of course properly not taxable, and the opinions cited are therefore readily distinguishable from and can have no bearing on the present case.

The argument of the other side is that this tax falls upon the exercise of a valid police power, and that since the power to tax includes the power to destroy, the police power, like the judicial power of a State, might be destroyed by Congress under the guise of taxation if the right to tax it exists at all. On this the decisions are marshaled which hold that the United States have no power to tax either the instrumentalities

or the property of the State. That is fully conceded, but the question is, whether the instrumentality is a legitimate agency of government. The appellant invokes the principle that by no subterfuge of language or indirection can the limitation upon the taxing power be evaded. But neither can the limitation upon the police power; and here, too, the Supreme Court will reach through the form to seize the substance. The principle of the exemption from the taxing power was fully reviewed in the Income Tax cases, and the doctrine stated in this sentence:

> As the State can not tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State. (157 U. S., 429, 584.)

The limitations are also well expressed in *United States* v. *B. & O. R. R.* (17 Wall., 322), thus:

> It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.

This case is outside the rule. It is not a power or operation of government in any true sense which the United States is taxing. The business taxed is not

a necessary agency for the legitimate purposes of State government.

The distinction may be clearly illustrated by a ruling of internal-revenue practice which counsel cites, viz, that a liquor-dealer's license, being a certificate required by the laws of a State in the exercise of government functions, comes within the exception. Of course such a document issued under State laws was relieved of Federal taxation, but the business was not, and the liquor dealer whose State license could not be taxed as a document necessarily paid the Federal special tax on his business. The internal revenue rulings have not been uniform, and would not be controlling precedents before this court; but with reference to the ruling of Mr. Delano in 1870 it is to be said that the Massachusetts law under which the town's agent was held not liable to special tax, like the Maine law, was a real measure of prohibition and only permitted sales by towns for limited purposes, medicinal and industrial.

But before pursuing the inquiry, as to a valid exercise of police power, I note the authorities which show that the exaction is not in strictness a *tax* on *person* or *property* at all, but preeminently an *excise*, the most familiar and characteristic of all; something "cut out" of the price, resting on the *sale* of the goods and paid in the last analysis by the consumer. The tax is merely an expense of the business. It is manifest, on these well-known grounds, that there has been no actual burden on the State or its property; its customers have paid

the tax, and this principle is evident when considered in connection with the fact that these taxes were charged in as expenses of the business and were so passed by the State's accounting officers. The tax may also be viewed as taking the form of an occupation tax and license, but it falls none the less within the indirect class and is as truly an excise as the charge per gallon on whisky or per hundred on cigars. The leading cases are: *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; *Veazie Bank* v. *Fenno*, 8 Wall., 533; *Scholey* v. *Rew*, 23 Wall., 331; *Nicol* v. *Ames*, 173 U. S., 509; *Knowlton* v. *Moore*, 178 U. S., 41; *Patton* v. *Brady*, 184 U. S., 608; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397.

In *Nicol* v. *Ames*, where the tax was imposed under the war-revenue act of 1898 upon sales of products or merchandise at an exchange or board of trade, the court said (pp. 518, 519):

> We think the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business. * * * It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. * * * Its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise.

This language was quoted and approved in *Knowlton* v. *Moore*, deciding that an inheritance tax was not a direct tax on property, but an excise on the transmission or receipt of property, occasioned by death.

In *Patton* v. *Brady* the tax imposed by the act of June 13, 1898, on tobacco was held not to be a direct tax, but an excise; that it was not "a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use."

Upon a review of these cases in *Spreckels Sugar Refining Co.* v. *McClain* the court held that the tax imposed on the plaintiff with reference to its carrying on the business of refining sugar was a special excise tax.

(B) The Federal excise is levied pursuant to express constitutional grant of power; it is superior to the reserved police power of the States, which can not control the powers created or prohibitions imposed by the Constitution.

The grant is:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, cl. 1.)

This power of taxation is especially broad, absolute, and untrammeled; it is in no wise affected by the fact that States under their like sovereign power do or may tax the same object, activities, or rights; it includes liquor excises and license fees. (*McCulloch* v. *Maryland*, 4 Wheat., 316; *Gibbons* v. *Ogden*, 9 Wheat., 1;

License Tax Cases, 5 Wall., 462; *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; *Austin* v. *The Alderman*, 7 Wall., 694; *Veazie Bank* v. *Fenno*, 8 Wall., 533; *Knowlton* v. *Moore*, 178 U. S., 41; *The Oleomargarine Cases*, 195 U. S., 27.)

State police power is necessarily subordinate to the granted powers of the Federal Government. For instance, it is well settled that State laws of police and public welfare become inoperative so far as they interfere with the Federal power over interstate commerce.

In *Bowman* v. *Chicago and Northwestern R. Co.* there was a State prohibition law, and the court said that in the License Tax cases it was held that the States could not only regulate the sales of imported liquors, but could prohibit sales. But, further, it was said that while the States could act upon certain subjects within the commercial power of Congress until Congress intervenes with its authority, nevertheless, where the subject is national in character, requiring uniformity of regulation and affecting equally all the States, like the interstate transportation of goods, Congress alone can act and provide the needed regulation. (125 U. S., 465, 507.)

The general principle is thus laid down in *Railroad Co.* v. *Husen* (95 U. S., 465, 473–474):

> The police power of a State can not obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope can not be secured at the expense of the protection afforded by the Federal Constitution.

Before the passage of the so-called Wilson act of 1890 it was thoroughly established that it was not within the power of a State to forbid the importation of liquors from foreign countries or other States, nor their sale in original packages, nor subject the sale to discriminatory taxes or regulations. (*Walling* v. *Michigan*, 116 U. S., 446; *Leisy* v. *Hardin*, 135 U. S., 100; *Lyng* v. *Michigan*, 135 U. S., 161; *In re Rahrer*, 140 U. S., 545; *Rhodes* v. *Iowa*, 170 U. S., 412; *Vance* v. *Vandercook Co.*, 170 U. S., 438; *American Express Co.* v. *Iowa*, 196 U. S., 133.) Under the Wilson act, however (August 8, 1890, 26 Stat., 313), Congress consented, to a certain degree, that the States should regulate the introduction of liquors into their confines, by providing that intoxicating liquors, when transported from one State to another, should lose their character as interstate commerce and be subject to the operation of State laws, upon completion by delivery and before sale in the original packages; and this act was passed upon in the cases of *In re Rahrer* (140 U. S., 545) and *Rhodes* v. *Iowa* (170 U. S., 412), which held that the act was a valid exercise of the power to regulate commerce. In *Vance* v. *Vandercook Co.* (170 U. S., 438), a case coming from South Carolina, the Wilson act was again before the court, and it was held that since the passage of the act, while the right existed to receive intoxicating liquors sent from another State without regard to the State laws to the contrary, there was no right to their sale in the original packages in defiance of State law.

But this statute and the decisions under it do not affect the principle that in the absence of permissive legislation by Congress the States may not under the police power pass any law which interferes with the regulation of commerce between the States.

Take another illustration: In *New Orleans Gas Co.* v. *Louisiana Light Co.* (115 U. S., 650), it was decided that a grant by the State of an exclusive right to the gas company was a contract which could not be impaired by a subsequent constitutional provision that no monopoly should be granted and by a statutory revocation in pursuance thereof. The police power in this case yielded to a prohibition of the Constitution of the United States.

There are numerous other cases showing that a State may by contract restrict the exercise of its powers beyond the right of revocation, where exclusive grants of highway and bridge privileges have been made or exemptions from taxation have been conferred. (*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116; *The Binghamton Bridge*, 3 Wall., 51; *Asylum* v. *Home of the Friendless*, 8 Wall., 430; *Humphrey* v. *Pegues*, 16 Wall., 244, 248, 249; *Farrington* v. *Tennessee*, 95 U. S., 679, 689; *Asylum* v. *New Orleans*, 105 U. S., 362, 368.) Other illustrations are found in those cases in which State police power sought to deal with undesirable immigrants, and the principle was laid down that such statutes are unconstitutional whenever they conflict by their necessary operation and effect with the paramount authority of Congress. Thus, in *Henderson* v. *Mayor*

(92 U. S., 259, 271), the court, through Mr. Justice Miller, while declining to decide whether in the absence of Congressional action the States can, or how far they can, protect themselves against foreign paupers, criminals, and diseased persons, held that no definition of the police power and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. (See also *Chy Lung* v. *Freeman*, 92 U. S., 275.)

The *Slaughter-house cases* (16 Wall., 36, 62) pointed out that the police power is from its nature incapable of exact definition or limitation; and in *Stone* v. *Mississippi* (101 U. S., 814, 818) it was said that it is "easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate." There is a power, broad and somewhat vague, which has been called the police power, residing in the States, by virtue of which they may, within certain limits, control everything within their respective territories. Upon the proper exercise of this power under many circumstances may depend the public health, public morals, or public safety, and this is conceded in all the cases. In this broad sense the power may be said to include all legislation and almost every function of civil government, and under this conception or definition we may classify the authority of the State to create educational institutions and establish charities,

to provide for the maintenance and control of highways, ferries, and other public utilities, to carry on certain public works, like the draining of swamps. For instance, the Supreme Court of Louisiana has decided that the taking of property for building a public levee is an exercise of the police power and *damnum absque injuria*, because the State has a servitude over lands on navigable rivers for making and repairing levees, roads, and other public works. This view was recognized by this court in *Ledyard* v. *Tresevant* (160 U. S., 452).

But all definitions of the power must, as was said by Mr. Justice Harlan, speaking for the court in the case of the *New Orleans Gas Co., ut sup.*, "be taken subject to the condition that the State can not in its exercise for any purpose whatever encroach upon the powers of the General Government or rights granted or secured by the supreme law of the land."

Coming now to the bank and tax cases—in *Veazie Bank* v. *Fenno* (8 Wall., 533, 547, 549) the Federal statute enacted under the power to coin money and the power to lay and collect taxes (Art. I, sec. 8, cls. 5, 1) was attacked upon the ground that it was a tax upon a State instrumentality exercised by the State under its police power; but the court held that since the Constitution granted the power expressly any appropriate legislation was superior to the State police power, and that the particular legislation was entirely constitutional. The court said (p. 547):

> It may be admitted that the reserved rights of the States, such as the right to pass laws, to

> give effect to laws through executive action, to administer justice through the courts, and to employ all *necessary* agencies for *legitimate* purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and, when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

Is the proposition sound that the sale of intoxicating liquors for profit is one of the necessary or legitimate purposes of State government? If the State delegates authority to her citizens to sell liquor and exacts a license tax, the Federal excise must be paid before that authority or privilege may be exercised. Any franchise or privilege granted by the State is liable to Federal taxation; and yet the claim is that, because the State herself exercises the privilege that may be and often is granted to and exercised by individuals, she can stand on the reserved State powers to avoid the payment of the Federal tax.

The case of *National Bank* v. *United States* (101 U. S., 1) is precisely in point and appears to be controlling. There the United States sought to collect the 10 per cent tax on State bank notes issued during a period of years. The notes were issued and put in circulation by the city where the bank was located, and used as money in ordinary business transactions.

By a municipal ordinance, and by an act of the legislature, they were receivable in payment of dues to the municipality. The contention was made that a municipal corporation is part of the State government and is protected from Federal taxation precisely as the State itself; that the issuance and function of the circulating notes constituted an instrumentality of the State. It was sought to distinguish the case of *Veazie Bank* v. *Fenno* on the ground that there the franchise was granted to private persons and for private purposes, while in the Arkansas case the notes were evidences of debt contracted for public uses by a branch of the State government and formed a part of the debt of the State itself. But the court affirmed and applied the doctrine of *Veazie Bank* v. *Fenno*, saying (p. 6):

> The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but can not, against the will of Congress, make them money. * * * Such a use is against the policy of the United States. * * * The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.

In *McCray* v. *United States*, 195 U. S., 27 (the Oleomargarine cases), Mr. Justice White said, in answer to the contention that the oleomargarine tax was void because it was manifest that the purpose of Congress was to suppress the manufacture of the article:

> Undoubtedly, in determining whether a particular act is within a granted power, its scope

and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

It is very apparent that the license tax rests, not upon the liquor itself or other property of the State, but upon the privilege of dispensing the liquor as a beverage. The person engaged in dispensing at a dispensary under the State regulations, if a private person, would undoubtedly be liable for the tax, and the official character and relation to the State do not change his character as a dealer. "The word 'dealer' is not confined to one who sells his own property only." (*United States* v. *Allen*, 38 Fed. Rep., 736.) The only real difference between the method of conducting a

dispensary and an ordinary bar-room is that a blank application must be filled out for liquor from a dispensary, and the liquor can not be drunk upon the premises; for as to the other minor restrictions relating to retail sale they are practically universal and common to all systems, such as sale on Sundays and sale to habitual drunkards. The Federal statute contains no suggestion that where such restrictions apply the character as a retail dealer is absent. The law merely provides that a retail dealer is one who sells in quantities less than 5 gallons. The fact that the dealer is the agent of the State and obtains his goods from the State can make no difference whatever under the principles shown above. If a State desires to engage in the banking business and circulate her promissory notes as money, she must pay the prohibitory tax for the privilege; and so if she desires to sell liquor as a beverage, she must pay the license tax. In both instances she is engaged in business lawfully subject to taxation by the Federal authority, and can not by invoking police power or State sovereignty set at naught the powers and functions of the Federal Government by express grant in the Constitution.

The consequences of a construction are not conclusive, yet are often worthy of notice. (*United States* v. *Edmonston, ut sup.*) This principle is very pertinent here, and, if the State's contentions are well founded, she may assume entire control of the manufacture of all spirituous, vinous, and malt liquors; of the right to manufacture and sell tobacco in its various forms, de-

priving the Federal Government of its revenue from this source. She may import foreign wines and liquors for sale in her dispensaries and claim immunity from import duties, and import drugs, remedial and poisonous, which she might undertake to sell. On the ground that clothing manufactured in the great cities under objectionable conditions and methods was unhealthful and injurious to her citizens, she might claim to import free foreign woolens and cloths of every description. The field is limitless. And if one State has such rights, then every State in the Union has similar rights, and the result would be that the Federal power of indirect taxation, which is one of the General Government's principal sources of revenue and one of its most essential functions in the original compact between the States, would be shattered and destroyed.

(C) In no just sense is the dispensary system a valid exercise of the police power.

I shall not speak of the side of this matter which involves theories of social science and the proper function of the State. Such considerations are political and economic, not judicial. There is a tendency in recent years to experiment practically with some old theoretical ideas as to the meaning and duty of government. There has been also, no doubt, an increase on sound and legitimate grounds of the activities of the State and restrictions by the State. To a certain degree this is natural, inevitable, and in pursuance of law as real as the laws of the physical universe, and

to that extent the movement is right. But whether right or not, it is in the region of the restrictions rather than the activities that the police power operates, and the question of the fitness and scope of the police power in a given exercise or instance is purely judicial. In short, the police power of government ought to be confined to the detailed enforcement of the maxim, *sic utere tuo ut alienum non loedas;* and tends to exceed its due bounds when founded on the maxim *salus populi suprema lex.*

A State in its sovereign power and municipal capacity, or as a quasi corporation, may, perhaps, have the legal competence and right to engage in ordinary business, unless restrained by its own constitution. But this is not due to its police power, which is confined to imposing restrictions and regulations on individuals and particular kinds of business in the interest of public morals and hygiene, or in freeing production and domestic commerce from private restrictions. *Laissez-faire* is here a just and sane rule. Except to preserve freedom of trade the police regulation of business occupations can not be instituted and enforced consistently with sound principle unless the occupation is harmful in some way to the public. (See Tiedeman on Limitations of the Police Power, sec. 102.) There can be no question of the constitutionality of prohibition laws. The State is the sole and absolute judge whether the liquor traffic is inherently injurious to the health, morals, and welfare of the people. The State may prescribe regulations for pursuits and callings which will promote health,

good order and prosperity, but the pursuit must be free and open to all persons who are qualified under the law and conform to the regulation. The legislature can not determine that a certain business is injurious to the health and morals of the community and then create a monopoly in the State itself to carry on the generally forbidden traffic. This law is entirely unlike those wherein after a declaration that the sale and consumption of liquor is harmful, permits sale in a limited way for certain purposes (medicinal, mechanical, and manufacturing) but prohibits sale as a beverage to everyone. The State, if of opinion that liquors are injurious, may prohibit their sale as a beverage absolutely, or it may restrict and regulate under a high-license system. It can not, under the guise of remedying the evils, forbid citizens to engage in the business and then turn it into a government monopoly. That is not the exercise of legitimate power of police reserved to the States.

The fundamental question was admirably put and answered in *Mugler* v. *Kansas* (123 U. S., 623, 661), from which I quote briefly:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

The opinion then examines the prohibition law of Kansas, and declares that government does not impair constitutional rights when it determines that the use of intoxicating drink as a beverage is hurtful to society and constitutes a business in which no one may lawfully engage:

> Those rights are best secured, in our Government, by the observance, upon the part of *all*, of such regulations as are established by competent authority to promote the common good. *No* one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare (p. 663).

The Indiana cases (*supra*) probably would not be followed at this day so far as to declare a law unconstitutional which forbade the manufacture or sale of liquor by any person whatever and allowed the State to sell merely as a medicine. Such a law, as I have indicated, would be practically prohibitory upon all, and as such, notwithstanding the limited exception, would be constitutional. In the Minnesota case (*Rippe* v. *Becker*, *supra*) the court held that a law providing for the maintenance and operation of a grain elevator by the State is not the exercise of police power to regulate the business of warehouse handling of grain. The discussion of the opinion is interesting and helpful on the situation now before this court. The court, referring to various kinds of business, including the liquor business, said:

> If counsel's contention is correct, we do not see why, as a means of regulating these kinds of business, the State itself might not engage in running hacks, pawnbrokers' shops, building and operating distilleries and breweries, *or even running saloons.* But further illustration can not be necessary. The police power of the State to regulate a business does not include the power to engage in carrying it on.

The logical result of the State's argument is that a State might engage in the manufacture and sale of tobacco, deleterious drugs, arms and explosives, and many other forms of mercantile business, because there is scarcely any business which may not be carried on in such manner as to become injurious to the health and morals of the community. For example, it is easy to see that the selling of beef and the canning of goods in some aspects and at some points may call for police restriction. If the legislature has the power to invest the State with a monoply of every trade or mercantile business which may possibly become injurious to the public welfare there will be very little business left in which the citizens of the State could engage on equal terms.

The constitution of South Carolina of 1895 (article 8, sec. 11) contains a declaration of right in the State on the subject of the liquor traffic, its prohibition, regulation, and license, which is the foundation of the statute and contemplates the very system adopted thereunder. But this does not alter the situation. A State can not increase its police powers merely by enumerating large

conceptions of them in its fundamental charter. The limitations of the Federal Constitution and general principles of jurisprudence operate as a check. State police power consists only of such necessary and legitimate instrumentalities of *government* as have not been delegated to the United States and do not conflict with the powers and duty of the Federal Government under the Constitution of the United States. Legitimate police powers have been reserved to the States, but they exist and continue by virtue of the compact in the Federal Union and can not be increased by any constitution which the State may adopt.

(D) To show further that the State liquor system is not in any valid sense an exercise of police power, the public facts of the case are discussed. They reveal that the State has deliberately embarked in a commercial enterprise in reality for the sole object of profit and gain.

What is the real fact here when all the wrappings are removed and mere professions ignored—that the trade is incident to the police regulation, or the police regulation incident to the trade?

The South Carolina statutes on their face show that the system does not purport to be a police regulation of the liquor traffic, but merely a scheme whereby the State realizes the profits of the business instead of private individuals. Careful examination and analysis of the act of 1892, with its principal amendment of 1893 (for the numerous later amendatory acts relate merely to details and do not affect the organic principle), disclose no features of police regulation except these:

That liquor must not be sold in a less quantity than half a pint or greater than 5 gallons; that it may not be drunk upon the dispensary premises; that sales must be made only between sunrise and sunset, and shall not be made to minors or habitual drunkards; that applications for purchase must be made out and signed by the actual purchaser. Most of these are ordinary restrictions everywhere upon private dealers under license systems. As to the necessity of filling out an application for the purchase, I show below that this is merely a dead letter and is not enforced. The law as a police measure can not be defended upon these meager provisions for State regulation and control of the traffic. It is hardly conceivable that the State should have launched upon this vast business enterprise and engaged in the exclusive sale of spirits to enforce such regulations. Manifestly, the chief motive of the State was not the desire to regulate and control the use of spirits as a beverage, but to appropriate the profits of the traffic. This court will look beyond the professions and pretensions of a law to the real substance and ascertain for themselves whether it is really what it purports to be. (*Mugler* v. *Kansas ut sup.*) In whatever language a statute is framed its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith and for the purpose expressed in its title does not prevent the court from examining into the real intention and effect. (*Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v.

Wright, 141 U. S., 62; *Booth* v. *Illinois*, 184 U. S., 425, 429.)

In the message of Governor Tillman to the South Carolina legislature for the session beginning November 22, 1892 (Reports and Resolutions, S. C., 1892), he speaks of the prohibition sentiment, strong in the country, opposed in the towns. He says little or nothing either directly or by implication of the moral sentiment at the root of adherence to the prohibition cause, but points out that the liquor men make money selling liquor, the towns make money, the county—that is, the country—suffers; the county pays for it and the county has increased taxes for it. He refers to his previous message calling attention to the injustice of allowing the towns to license the nuisance and derive therefrom an income at the expense of the county and State, and urging that all money derived from this source should go into the county and State treasuries.

> When it is known that no benefit will accrue to the towns by the licensing of bar-rooms, public sentiment in them will rise up in arms to suppress the nuisance which increases the municipal taxes, and every man will be more or less interested in seeing the laws enforced. * * * On the other hand, you see that the absolute refusal to license the sale of liquor will cause an increase in the taxes of the counties amounting to one-half mill.

So that in this initiation of the scheme it is evident that it was a mere general license to sell liquor. In accordance with this recommendation, the legislature

appropriated money for purchasing a stock of liquors and engaging in that business by the passage of the first dispensary law. I have already given the title, and the law was an act to prohibit sales except by the dispensary which was established. The division of profits between the city, county, and State was prescribed, and there were stringent provisions regarding liquor brought into the State by any person for the purpose of sale, providing for confiscation and the imposition of a fine and imprisonment (sec. 25). The act of 1893 prohibited the importation of liquor into the State for any purpose (sec. 33). This section, as reenacted in the dispensary law of 1896, with the amendment of 1897, were declared unconstitutional by the Federal court (*Vandercook Co.* v. *Vance*, 80 Fed. Rep., 786). Thereupon importations of liquor became so frequent as to threaten the profit features of the State dispensary establishment. Accordingly, Governor Ellerbe said in his annual message to the assembly at the session beginning January 11, 1898 (Reports and Resolutions, S. C., 1898):

> Judge Simonton has destroyed, along with the dispensary, the license system *when run for profit*. What, then, is left to do? We must either enact prohibition or continue the dispensary system *without the profit feature*. * * * Many have approved the dispensary system *because of the profit feature*. We can certainly get rid of the original-package dealers and their demoralizing traffic by continuing the dispensary shorn of all profits and administered only

> as a police regulation to control and reduce the liquor evil. * * * We might try this policy for a year, and next winter, after Congress shall have acted or failed to act, and after the Supreme Court at Washington shall have decided what is to become of the State's power to control liquor under the Wilson bill of 1890, we shall be in a position to take final action.

It appears to be very clear from this message that the primary and principal purpose of the dispensary as originally established was the profit in money that the State made out of the business. But the message is hopeful, and hence the suggestion that regulation without profit might be tried for a year to see if something would not turn up. If the object of the law was only to control and reduce the liquor evil, then why regard with such concern the loss of the profits? The only legitimate exercise of the police power would have been the passage of an act to control and reduce the evil, and for that purpose only. Since the executive of the State admits that this could be done without the profit features of the dispensary act, then the legitimate function of the law could have been accomplished without the addition of this commercial element.

In *Vance* v. *Vandercook*, 170 U. S., 478 (1898), the State obtained the favorable decision for which the governor was waiting; that is to say, it was decided in view of the amendment of 1897 allowing, under rigorous rules, importation of liquor for personal consumption, that a citizen of the State may import liquor

for his own use, but not for sale after importation. Thus the principal obstacle to the commercial success and profit of the dispensary system was removed and this money-making business of the State has prospered ever since.

It appears that all the governors during this period were ardent supporters of the State's plan to control and profit by the traffic. Thus, Governor Ellerbe says in his message of 1899 (Reports and Resolutions, S. C., 1899):

> The dispensaries have been forced to fight free whisky on terms of absolute equality, yet, strange to say, they have fought it successfully, for while the profits were reduced by this lawless competition, there was still enough business to make the dispensary self-supporting and leave a small margin of profit.

This message states also the view that whisky should not be sold in any county where a majority favor prohibition, and therefore recommends submission of the question to the electors.

> It is both right and just for these counties which have prohibition or may hereafter adopt it * * * to be taxed to enforce such law, nor should they receive any part of the profits arising from the sale of liquor in the other counties to add to their school funds.

In a sense this is a premium on liquor drinking and forcing whisky down the throats of the people with a vengeance. The recommendations of the governor were adopted, and a law was passed by the legislature in conformity with his views.

The State Dispensary Commissioner in his report for the year 1895 (R. & R., 1895, vol. 2, p. 841) complains that some of the subdispensaries located in the smaller towns have been operated through the dull season at a loss to the counties in which they are located, and suggests that steps be taken "to prevent a recurrence of these undesirable results during the coming summer."

In Governor McSweeney's message of 1900 he says that he is unable to obtain the returns of the business for the fiscal year in time for his message, but is informed "that the profits will be much larger than in any previous year since the enactment of the dispensary." In his message for 1902 he states the gross sales, and the net profits of over $500,000, and recommends that the fine imposed for violation of the dispensary law be reduced in order that the State might put a premium upon the payment of the money in place of serving the alternative minimum three months sentence.

The real inspiration of the system and its operations appears to have been cupidity; the results following were natural, and this is one of the manifest dangers when States engage in business. The highest duty is neglected for considerations of profit. The inevitable result of the universal desire of the State officers to make as much money for the State out of the system as possible was to ignore the safeguards of the law and to sell in violation of them.

In Governor McSweeney's message for 1901 he says:

> It has become customary for county dispensers to sell to anyone who applies to purchase without being identified or without signing the application in his own true name and signature and without stating for whom or for whose use it is required.

But this was not strange, for the dispenser's salary and employment depended entirely upon the commercial success of the dispensary. If it was not profitable, or at least did not pay expenses, it was closed up. That was the natural result of the State's engaging in this business—that its own officers would violate and nullify its law. It is notorious that the State permits private individuals to engage in the sale of beer under so-called "beer privileges," upon the payment of a certain royalty to the State. The State does not own the beer and takes no interest in the matter except to collect the royalties. The record shows how indifferent the State is to its professed policy of prohibition and strict regulation, because the finding is that there are 260 private individuals selling liquor as dealers in competition with the State and in flat disobedience of its statutes. (Record, p. 14.) This fact is founded upon official internal-revenue records. It almost seems as if the probability was reckoned with that after all the ready ability to obtain liquor anywhere, even through forbidden agencies, increased the demand and in the long run helped the State policy of profit by the business, more than strict and genuine

enforcement of the prohibitions against sales by private persons. These irregular "inducing" establishments are located as a rule in the neighborhood of dispensaries, and sometimes in the same building, and they are known as "blind tigers." It also seems that the practical immunity to illegal sellers is because they purchase their goods from the State dispensaries. If these are not the reasons why of recent years "blind tigers" flourish, and such irregular selling is not pursued and checked as formerly, when these outside dealers were so ill advised as not to purchase from dispensaries, why, then, is the State lax in prosecutions under its law? The report of the attorney-general of the State for 1901 shows but five instances of the charge of selling liquor in violation of law in the county of the capital (Richland County), where the wholesale establishment of the State and retail dispensaries are located. Each of these cases was dismissed without any trial whatever. In Charleston for the same year the report shows there were 59 cases of selling in violation of law and not one was prosecuted.

So eager was the State for gain that not only did it seek the ordinary profits of the trade as a domestic business and adopt the plan of encouraging fines for violation of the law rather than imprisonment, but it sought to encourage any outside trade, whether with *bona fides* or not may be questioned. The trade-mark case which I have noted (*ante*) shows that the State asked for this special right for its brand of liquors on the ground that it was engaged in foreign commerce, particularly with Canada.

All the foregoing facts are entirely public and notorious; they show beyond doubt that so long as the State finds its profit in current conditions, it is not greatly concerned about enforcing its law. What sort of prohibition does this showing reveal? What conception of police restriction in the interest of public health or morals? It is a great liquor business, pure and simple, in its essential character; it is a money-making enterprise and the agency (it seems) of party politics. Not content with the usual profits of this doubtful traffic or with the money fines for violation of its monopolistic law, which it seeks in preference to enforcing the deterrent punishment of imprisonment, it is now endeavoring to add to its profits by recouping the excise tax which the Federal Government imposes upon this business, legally and justly subject to that burden at all times and on all grounds. This is not an exercise of the police power, and there is no reason whatever in law or morals why the business in the hands of a State should not as justly pay the Federal excise as if it were in private hands under the open competitive conditions of some general license system.

In *Bank of United States* v. *Planters' Bank of Georgia* (9 Wheat., 904) the Chief Justice said (p. 907):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its

> privileges and its prerogatives, it descends to a level with those whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty.

And again, at page 908:

> The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

This doctrine was reaffirmed in *Bank of Kentucky* v. *Wister*, 2 Pet., 318, 323; *Briscoe* v. *Bank of Kentucky*, 11 Pet., 323, 324; *Railroad Co.* v. *Letson*, 2 How., 551; *Curran* v. *State of Arkansas*, 15 How., 308. The principle certainly applies to the business transactions of a State, however the business may be conducted—whether the State enters it as a partner, or as a stockholder and member of a corporation, or, as here, alone and by creating an exclusive monopoly. The State has strangely chosen to step down from its sovereignty so far and engage in this business, and must take the consequences.

The opposing brief emphasizes the fact that one of the grounds pointed out by the Supreme Court of South Carolina in the Aiken decision (which the opposing brief quotes at length) for the view that the law was in the interest of good morals and that many safeguards are thrown round the sale of liquor, was the fact that local option was recognized, and a majority of the voters in a township could prevent the establishment of a dispensary (sec. 8, act of 1893), but that section also contains this proviso:

> That nothing in this act contained shall be so construed as to prohibit persons resident in counties which shall elect to have no dispensary from procuring liquors from dispensaries in other counties, or county dispensers from shipping same to their places of residence under proper labels or certificates.

What meaning, then, was there in the right of local option or in such encouragement to prohibition, when the morals of the people could be corrupted, the will of the voters nullified, and the safeguard demolished by easy sales and legal shipments from an adjoining county? In two counties, by the same section of the act of 1893, Williamsburg and Marion, and in Pickens County and incorporated towns in Oconee County, and indeed throughout that county, by the amendment of 1894 (sec. 8, Acts S. C., 1894, p. 727), and by another act of December 18, 1894 (Acts S. C., 1894, p. 1066), the local-option privilege was withdrawn or rendered nugatory. In fact, the numerous additions and modifica-

tions of the law suggest that it was the sport of contending interests and was changed continuously to suit various supposed exigencies, mostly indicating either a desire to enlarge profits or open the door to drink while professing the contrary. For instance, the act of 1894 (acts of 1894, p. 735) and the act of 1896 (acts of 1896, p. 138) permit owners of tourist hotels to sell liquors either night or day if bought at a dispensary, while the act of 1901 (acts of 1901, p. 706) prohibits the distilling of liquor within two miles of any church or public school, but allows distilling in Pickens County to be carried on within one mile of churches and schools.

Opposing counsel make much of the differences between the act of 1892 and the act of 1893. In the first the revenue feature was an integral part of the law, in the second it was subject to such rules as might be prescribed by the State board of control; and the Supreme Court of the State in the Aiken case (decided when the complexion of that court had changed) held that it is within the power of the board of control to eliminate the profit feature altogether. But they have not done so, and the amendment makes no difference in the character of the law and the aspect of the matter before the court. The profits, as the messages of the governors show, have been large and increasing ever since the constitutionality of the law was upheld, and there is little difference between the Court of Claims reference to an "authorized profit of 50 per cent," of which the appellant's brief complains, and the act of

1892 itself which limits the profit of sales to not more than 50 per cent. The act of 1892, which alone makes the specific profit limitation to 50 per cent, contained a limit in fact, viz, that percentage; but under the powers confided to the board of control by the amendment of 1893 the profit might legally be without any limit whatever.

I submit, therefore, that the South Carolina dispensary system is not a valid exercise of police power; that, as the State chooses to embark in the liquor business, it does so with the same consequences and subject to the same liabilities as a private individual or an ordinary corporation, and that the internal taxes collected here were properly exacted. I submit that the claim of the State is without merit and should be denied, and therefore that the judgment of the Court of Claims must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 10.—October Term, 1905.

The State of South Carolina, Appellant, vs. The United States. } Appeal from the Court of Claims.

[December 4, 1905.]

By several statutes, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sale by other than the dispensers. The United States demanded the license taxes prescribed by the internal revenue act for dealers in intoxicating liquors, and the dispensers filed the statutory applications for such licenses. The State, sometimes in cash and sometimes by warrant on its treasury, paid the taxes. No protest was made in reference to these payments prior to April 14, 1901. On that day a formal protest by the State dispensary commissioner was filed with the United States collector of internal revenue at Columbia, South Carolina. No appeal or application for the repayment of the sums paid by the various dispensers was made by them or by the State of South Carolina to the Commissioner of Internal Revenue, as authorized by sections 3226, 3227 and 3228 R. S.

The dispensers had no interest in the sales and received no profit therefrom. The entire profits were appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the State treasury. In the year 1901 the profits arising from these sales amounted to $545,248.12. While the laws of South Carolina prohibited the sale of liquor by individuals other than the dispensers, of 373 special license stamps issued in that State by the United States internal revenue collector, only 112 were to dispensers, while 260 were to private individuals. Three separate actions were commenced in the Court of Claims by the State of South Carolina to recover the amounts paid for these license taxes. These actions were consolidated. Upon a hearing findings of fact were made and a judgment entered for the United States. 39 Court of Claims Reports, 257. Whereupon the State appealed to this court.

Mr. Justice Brewer delivered the opinion of the Court.

The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply the

agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. It is true a further question is made whether the act of Congress is broad enough to include such persons. But upon this we have little doubt. Section 3232 R. S. provides:

"No person shall be engaged in nor carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3244, contains these words of description:

"Every person who sells, or offers for sale foreign or domestic distilled spirits, or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

"Person" is also defined:

"SEC. 3140. . . . Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person."

Now, the dispensers were persons who sold liquors. They applied for and received the licenses. True they were acting simply as agents of the State, but if the fact that the State was the principal creates no exemption from Federal taxation then the statute reaches them because they were the actual sellers.

We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty.

Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other

words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Dred Scott* v. *Sandford*, 19 How. 393, 426:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, well declared:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith* v. *Alabama*, 124 U. S. 465, 478:

"The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

And by Mr. Justice Gray in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274."

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Consti-

tution, and inquire what they must have understood to be the meaning and scope of those grants.

By the first clause of section 8 of article I of the Constitution, Congress is given the "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

By this clause the grant is limited in two ways: The revenue must be collected for public purposes, and all duties, imposts and excises must be uniform throughout the United States.

The fourth, fifth and sixth clauses of section 9 of article I are:

"4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"5. No tax or duty shall be laid on articles exported from any State.

"6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

Article V of the amendments provides that no one shall be deprived of "life, liberty or property without due process of law."

These are all the constitutional provisions that bear directly upon the subject. It will be seen that the only qualifications of the absolute, untrammeled power to lay and collect excises are that they shall be for public purposes, and that they shall be uniform throughout the United States. All other limitations named in the Constitution relate to taxes, duties and imposts. If, therefore, we confine our inquiry to the express provisions of the Constitution there is disclosed no limitation on the power of the General Government to collect license taxes.

But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. As said by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 651, 658:

"The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a State from

discharging the ordinary functions of government, just as it follows from the second clause of article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

In other words, the two governments, National and State, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of *M'Culloch* v. *Maryland*, 4 Wheat. 316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from. No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *The Banks* v. *The Mayor*, 7 Wall. 16.

The limitations on the powers of the States to tax national banks are founded upon the doctrines laid down in that case. So also the immunity of national property from State taxation. It is true that in most of the enabling acts for the admission of new States there is express provision that the property of the nation shall be free from State taxation, but as shown by Mr. Justice Gray, delivering the opinion of the court in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, this provision is merely declaratory and unnecessary to establish the exemption of national property from State taxation. See also *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, as to taxation by a State of an officer of the United States for his office or its emoluments.

The converse of this proposition has also been declared by the decisions of this court. In *Texas* v. *White*, 7 Wall. 700, 725, Mr. Chief Justice Chase, speaking for the court, declared:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *The Collector* v. *Day*, 11 Wall. 113, it was held that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a State. In the opinion of the court, delivered by Mr. Justice Nelson, it was said (p. 127):

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

See also *United States* v. *Railroad Company*, 17 Wall. 322; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429–584.

Upon this proposition counsel for plaintiff in error rely. There being no constitutional limit as to the amount of a license tax, and the power to tax being the power to destroy, if Congress can enforce such a tax against a State it may destroy this effort of the State in the exercise of its police power to control the sale of liquor. It cannot be doubted that the regulation of the sale of liquor comes within the scope of the police power, and equally true that the police power is in its fullest and broadest sense reserved to the States; that the mode of exercising that power is left to their discretion, and is not subject to national supervision. But if Congress may tax the agents of the State charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the attempt of the State to carry on this mode of regulation.

We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government." Art. IV, Sec. 4. That expresses the full limit of national control over the internal affairs of a State.

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *Vandercook*, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargerine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private indidviduals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested and ~~at the same time relieved~~ from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland, supra* (p. 431) for a complete answer:

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a State may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on the preservation of the rights of the States, they had no thought that those States would extend their functions beyond their then recognized scope, or so as to imperil the life of the nation. As well said by Chief Justice Nott, delivering the opinion of the Court of Claims in this case (39 Ct. Claims, 284):

"Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plane of a body politic to take up the work of the individual or body corporate. The public suspicion associated Government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in

granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.

If we look upon the Constitution in the light of the common law we are led to the same conclusion. All the avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business and not to exclude him therefrom. The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States* v. *Perkins*, 163 U. S. 625, and *Snyder* v. *Bettman*, 190 U. S. 249. In the former case a succession tax of the State of New York was sustained, although the property charged therewith was bequeathed by will to the United States, the court holding that the latter acquired no property until after the State charges for transmission had been paid, saying (p. 629):

"This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

In *Snyder* v. *Bettman*, the succession tax required by the laws of Congress was sustained, although the bequest was to the city of Sringfield, Ohio. This is almost a converse to the Perkins case. It was held that while the power to regulate inheritances and testamentary dispositions was one belonging to the State, and therefore subject to such conditions as the State might see fit to impose (as held in the Perkins case), yet the power to impose a succession tax was vested in Congress, that it could be exercised upon a bequest made to a municipality or a State, and was not to be considered as a tax upon the property bequeathed, the court saying (p. 254):

"Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the State government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

So here the charge is not upon the property of the State, but upon the means by which that property is acquired, and before it is acquired.

It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, in which a national tax of ten per cent on the amount of notes of any person, State bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of national taxation over State agencies (p. 547):

"It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day*, *supra*, in the argument in favor of the exemption of the salary of a State judge from national taxation, is this language (p. 125):

"It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company*, 17 Wall. 322, an attempt was made to collect a tax on money due from a railroad company to the city of Baltimore. It was held that the city was a portion of the State in the exercise of a limited portion of the powers of the State, and the court said (p. 327):

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government."

And again (p. 332):

"We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if

an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position."

In *Ambrosini* v. *United States*, 187 U. S. 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8):

"The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempted as no more taxable than the licenses."

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court of Massachusetts, speaking by Mr. Justice Gray, (afterwards an Associate Justice of this court,) in *Oliver* v. *Worcester*, 102 Mass. 489, 499, 500, observed:

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

"To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. . . . But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument."

In *Lloyd* v. *Mayor &c. of New York*, 5 N. Y. 369, 374, the court said:

"The corporation of the city of New York possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual."

See also *Maxmilian* v. *Mayor*, 62 N. Y. 160, 164; *Brown* v. *Vinalhaven*, 65 Me. 402; *Mead* v. *City of New Haven*, 40 Conn. 72; *City of Petersburg* v. *Applegarth's Administrator*, 28 Gratt. 321, 343; *Eastman* v. *Meredith*, 36 N. H. 285; *Western Saving Fund Society* v. *City of Philadelphia*, 31 Pa. St. 175. In this case it was held that a city supplying gas to the inhabitants acts as a private corporation, and is subject to the same liabilities and disabilities. In the opinion the court declared (p. 183):

"Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred."

See further a subsequent case between the same parties, in the same volume (pp. 185, 189); *Bailey* v. *The Mayor &c.*, 3 Hill, 531; 1 Dillon Mun. Corp. (4th ed.) sec. 66.

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which

is of a private nature that business is not withdrawn from the taxing power of the nation.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business.

The judgment of the Court of Claims is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 10.—October Term, 1905.

The State of South Carolina, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[December 4, 1905.]

Mr. Justice White, with whom concur Mr. Justice Peckham and Mr. Justice McKenna, dissenting:

The delicacy of the question, the suggestion that, apart from constitutional limitations, the ruling made is, from an economic point of view, a just one, and the long and painstaking consideration which the court has given the case causes me to be reluctant to announce a dissent. This, however, is overborne by the conviction that it is my duty to dissent and state my reasons. And this because the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the Government of the United States, establishes a doctrine which in its potentiality strips the States of their lawful authority. It does more than this, since the theory upon which the case is decided also endows the States with a like power to divest the Government of the United States of its lawful attributes. In other words, by the ruling and the reasoning sustaining it, the ancient landmarks are obliterated and the distinct powers belonging to both the National and State Governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other.

The case is this: South Carolina has adopted a law by which no liquor is allowed to be brought into the State for sale or to be sold therein, except such liquor as may be bought by a board of officers appointed by State authority, which liquor is sold by State agents appointed for that purpose under regulations prescribed by the statute. The question is, whether these agents of the State, for the act of selling liquor belonging to the State, as agents of the State, under the authority of the State, can be subjected to a license for carrying on the liquor business, levied by the internal revenue laws of the United States.

That the State, under its police authority, had the right to absolutely prohibit the sale of liquor, or to subject it to such regulations as it deemed proper, is elementary. So far reaching is that authority that a State may direct the destruction of liquor held contrary to law, with-

out paying the value thereof, and without thereby violating the constitutional safeguards as to the taking of property. (*Mugler* v. *Kansas*, 123 U. S. 623.) True, by the operation of the commerce clause of the Constitution, the absolute authority of the State does not extend to prohibiting the sale in original packages of liquor brought in from other States. (*Leisy* v. *Hardin*, 135 U. S. 100.) But that limitation no longer applies, since Congress has, by express legislation, permitted the power of the States to attach to all liquor shipped into one State from another, at once on its arrival, before sale in the original packages, as fully as if it had been manufactured within the State. And the validity of the statute referred to has been upheld by the court in reiterated rulings. (*In re Rahrer*, 140 U. S. 562; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *W. A. Vandercook Co.*, (*No. 1,*) 170 U. S. 468; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Adams Express Co.* v. *Iowa*, 196 U. S. 142; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17.) Indeed, one of these cases—the Vandercook case—involved the question whether the act of South Carolina, providing for the purchase and sale of liquor belonging to the State, as above stated, was repugnant to the Constitution of the United States, and the validity of the act in this particular was upheld by the court, because of the police power of the State and because of the provisions of the act of Congress limiting the effect of the interstate commerce clause as to liquor as already mentioned.

It is not necessary to trace the want of authority of the United States to impose a license exaction on the agents of the State to an express provision of the Constitution, since the court has constantly held that the absence of authority in the Government of the United States to tax or burden the agencies or instrumentalities of a State government, and the like want of authority on the part of the States to tax the agencies or instrumentalities of the National Government, results from the dual system of government which the Constitution created, and that the continuance in force of such a prohibition is absolutely essential to the preservation of both governments.

It would be superfluous to review in detail the many cases decided on the subject, but in the endeavor to bring the settled doctrine clearly to the mind, I refer to the most salient of the cases.

In *McCulloch* v. *Maryland*, (1819) 4 Wheat. 316, and *Osborn* v. *Bank of the United States*, (1824) 9 Ib. 738, it was held that a State could not impose a tax on the operations of the Bank of the United States or any of its branches. In *Weston* v. *City Council of Charleston*, (1829) 2 Pet. 449, *Bank of Commerce* v. *New York*, (1862) 2 Black, 620, *Bank Tax Case*, (1865) 2 Wall. 200, and *Banks* v. *Mayor*, (1869) 7 Wall. 16, it was decided that a State was without power to tax stock or bonds issued by the United States for loans made to it, when held by an individual or by a

corporation. In *Dobbins* v. *Commissioners of Erie County*, (1842) 16 Pet. 435, it was decided that a State might not tax the compensation of an officer of the United States. And, in *Van Brocklin* v. *Tennessee*, (1886) 117 U. S. 151, and cases cited on pages 167 *et seq.*, it was held that a State might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States.

Conversely, the adjudications concerning the want of power in the United States to tax the States are of a like scope. In *Collector* v. *Day*, (1870) 11 Wall. 113, 127, it was decided that Congress could not impose a tax upon the salary of a judicial officer of a State. In *United States* v. *Railroad Co.*, (1872) 17 Wall. 322, it was held that the United States might not impose a tax upon the property and revenues of a municipal corporation. Two members of the court dissented (p. 334), on the ground "that the private property owned by a municipal corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains and profits," was "taxable just the same as property owned by an individual, or any other corporation." In *Van Brocklin* v. *Tennessee*, *supra*, where, as we have seen, it was held that the State of Tennessee could not tax real property within its borders while held by the United States as proprietor, in reviewing the ruling made in *United States* v. *Railroad Co.*, the court said (p. 178):

"This court, in *United States* v. *Railroad Co.*, (17 Wall. 322,) held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the National Government from State taxation."

In *Mercantile National Bank* v. *New York*, (1887) 121 U. S. 138, 162, it was decided that the United States might not tax bonds issued by a State or one of its municipal bodies under its authority and held by private corporations. In *Pollock* v. *Farmers' Loan and Trust Company*—the income tax case—(1894) 157 U. S. 429, although much difference of

opinion was manifested in the court as to some of the questions involved, as to one, that is, the lack of authority in the United States to include in the amount of income subject to taxation by the United States money derived from interest on municipal bonds, the court was unanimous. The opinion, in reviewing the subject and citing approvingly *Collector* v. *Day*, *United States* v. *Railroad Co.*, the *Van Brocklin case* and the *Mercantile Bank case*, said (p. 584):

"As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

And, lastly, in *Ambrosini* v. *United States*, (1902) 181 U. S. 1, it was held that Congress could not impose a stamp tax upon a bond which the State law required to be given as a prerequisite to the right to sell liquor.

Is the ruling now made reconcilable with the cases just referred to? In other words, is it consistent with the theory of the Constitution as interpreted from the beginning? In order to give the reasons which convince me that it is not, let me review the contentions which are relied upon to support the ruling.

1. It is urged that as the State of South Carolina derives revenue from the sale, by the agents of the State, of the liquor belonging to the State, therefore the United States has also the right to derive a revenue from that source. If by this contention it is intended to suggest that the South Carolina law was not passed in the exercise of the police power of that State, and must be treated as a revenue law from the mere fact that some revenue results from the operation of the law, the unsoundness of the proposition is demonstrated by the previous cases. In *Vandercook, No. 1, supra*, that identical proposition was urged, and was decided to be without merit; and the same doctrine was reiterated in the cases of *American Express Company* v. *Iowa*, (196 U. S. 133;) *Adams Express Co.* v *Iowa*, (196 U. S. 142,) and *Pabst Brewing Co.* v. *Crenshaw*, (198 U. S. 17.) If the contention be that wherever, by the exertion of State power upon persons or things, a revenue is produced, there must be a corresponding right on the part of the Government of the United States to reap revenue by burdening the like person or thing, even although in so doing a State agency or instrumentality is taxed, the unsoundness of the proposition and its conflict with the previous cases becomes yet more apparent. One of the foundations upon which the doctrine rests, denying the power of the governments, State or National, to burden the instrumentalities or agencies of each other, is that if such burdening be permitted it might result in crippling the revenues of the Government, upon whose agency or instrumentality the tax was placed. Was this not the ground upon which the earlier cases were placed, and was

it not specifically declared to be the foundation of the ruling made in the ~~second~~ income tax case—*Pollock* v. *The Farmers' Loan & Trust Co.*, *supra*? The contention that because one government may have derived income from the exertion of its authority, therefore the other government has a right to do likewise, even if the agencies of the other government be thereby taxed, reduces itself to this: That the power to burden arises from the very condition which prevents the power from existing. If pushed to its logical conclusion, the far-reaching result of the proposition that wherever revenue is derived from an act by one government, therefore the other may burden the agent or instrumentality of the other may be readily illustrated. Take the National Government. If in the exercise of its ample authority to establish national banks a tax is imposed on such banks and a revenue derived, do the States thereby become entitled, without the consent of Congress, to tax banks? Take the Post Office Department. If by the carrying of the mails revenue is derived by the Government of the United States, are the States from that fact entitled to tax the instrumentalities employed by the Post Office Department? Take the ocean transport service of the United States. If under given circumstances a charge is made for transportation, and hence a revenue is earned, may the States cripple that service by taxation? It is no answer to the demonstration which results from these illustrations to say that the cases concern purely governmental functions of the United States, and, therefore, the States cannot tax the exercise of such functions. May I ask are these functions on the part of the United States any more governmental that is the power of the government of South Carolina to absolutely control at will the liquor traffic in that State?

2. It is implied that necessity demands the recognition of the right of the Government of the United States to tax the State agencies in question because the principle, by which alone such power on the part of the United States can be denied, will inevitably result in giving the States authority to destroy the Government of the United States by adopting peculiar methods of dealing with various classes of persons or property. Thus, it is said, the State governments may acquire all farms within their borders and thus deprive the United States of its power to impose a direct tax on land. That a State may import property from foreign countries and be exempt from import duty and undersell those who pay duty and render the collection of any import tax from others by the United States impossible. But these extreme illustrations amount simply to saying that it is possible for the imagination to foreshadow conditions which, did they arise, would impair the government created by the Constitution, and because such conjectures may be indulged in, the limitations created by the Constitution for the purpose of preserving both the State and National Governments are to be disregarded. In other words, that the government

created by the Constitution must now be destroyed, because it is possible to suggest conditions which, if they arise, would in the future produce a like result. But the weakness of the illustrations as applied to this case is apparent. They have no relation to this case, since it is not denied that as to liquor the State has absolute power, and may prohibit the sale of all liquor, and thus prevent the United States from deriving revenue from that source. Again, therefore, when the true relation of the argument to the case in hand is seen, it reduces itself to a complete contradiction, viz., a State may by prohibition prevent the United States from reaping revenue from the liquor traffic, but any other State regulation by which such result is accomplished may be prevented by the United States, because thereby the State has done indirectly only that which the State had the lawful power directly to do.

3. It is urged that the liquor in this case was owned by South Carolina, and in selling it the State was merely acting as a proprietor, and therefore the tax on the State agents is lawful. But here again the argument overlooks the absolute power possessed by the State concerning the liquor traffic, and the consequent right of the State in the exercise of its governmental functions to adopt such methods and instrumentalities as might be deemed best for the control of the traffic. Besides, the proposition is directly repugnant to the previous decisions of this court. Can anything be plainer than that the contention is directly antagonistic to the ruling made in *United States* v. *Railroad Co.*, *supra*, which ruling was expressly approved in the subsequent cases, especially in the income tax case? Was not the United States the proprietor of the land in Tennessee, which it was held in the Van Brocklin case the State of Tennessee had no power to tax? Conceding, for the sake of argument only, that the doctrine announced in the previous cases should be qualified, certainly such qualification would be wholly unreasonable if it did not propose to take in view the absolute and paramount nature of the governmental function under which the property or agency which it was proposed to tax was held or exercised. Reference is made to cases in State courts concerning the liability of municipal corporations to suits for negligence. I cannot see their appositeness to the issue here involved. Besides, the doctrine expounded in the line of cases referred to, if doctrine can be deduced from the confusion and contradiction which exists among the cases, has never received the approval of this court. On the contrary, the rulings of this court point the other way. (*Barnes* v. *The District of Columbia*, 91 U. S. 540; *Workman* v. *New York*, 179 U. S. 552, 574.) But grant that the rule applied by some State courts, in order to determine when a municipal corporation may be sued for a negligent act, has relation to this case, my mind sees no possibility of holding that the State of South Carolina, when by the law in question it provided for the purchase and sale of

liquor by its own agents, was not exercising a purely governmental function, in view of the absolute power of that State over that subject, and, moreover, in view of the act of Congress making such power complete and efficacious, even as to original packages of liquor before sale.

4. It is not, of course, by me denied that however varying may be the conditions to which the Constitution is applied, that instrument means to-day what it did at the time of its adoption; but I cannot give my assent to the doctrine that a limitation, which it has been decided over and over again arises from the very nature of the Constitution, is not to be enforced in a given condition to which the Constitution applies, because it does not appear that the framers could have contemplated that such conditions might be evolved in the course of the development of our constitutional institutions. To me it seems that no proposition could be more absolutely destructive of constitutional government.

Being of opinion that the State of South Carolina had complete and absolute power over the liquor traffic, and could exert, in dealing with that subject, such methods and instrumentalities as were deemed best, and that the United States was without authority to tax the agencies which the State called into being for the purpose of dealing with the liquor traffic, I, therefore, dissent, and am authorized to say that Mr. Justice PECKHAM and Mr. Justice MCKENNA concur.

True copy.

Test:

Clerk Supreme Court, U. S.